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IN THE

Supreme Court of the United States

October Term, 1964

No. ----

WINIFREDE RAILROAD COMPANY, a corporation,
and THE CARBON FUEL COMPANY, a corporation,

Petitioners.

vs.

LUTHER RAY RUMBAUGH.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Winifrede Railroad Company and The Carbon Fuel Company (herein sometimes called "Employers"), jointly and severally pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered March 2, 1964, in Case No. 9022, styled Luther Ray Rumbaugh, Appellant (Plaintiff Below) v. Winifrede Railroad Company, a corporation, The Carbon Fuel Company, a corporation, Local Union 14182 United Mine Workers of America, District 50

United Mine Workers of America, and United Mine Workers of America, Appellees (Defendants Below), wherein said Court reversed a judgment of the United States District Court for the Southern District of West Virginia, entered April 15, 1963, dismissing the complaint as to all defendants for lack of jurisdiction of the subject matter, together with the judgment of said Court of Appeals entered May 1, 1964, denying Employers' petition for rehearing.

A certified appendix record in said case, together with the proceedings in the Fourth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINIONS BELOW

The Fourth Circuit's original opinion and its opinion refusing rehearing appear in the Appendix hereto, at page 8a and page 25a respectively; in the certified record at page 24 and page 58 respectively; and the "corrected" opinion and the opinion refusing rehearing are reported in 331 F. 2d 530 (Adv. Op., June 22, 1964). The opinion of the District Court appears in the Appendix hereto at page 1a; in PA 38; and is reported in 213 F. Supp. 620.

JURISDICTION

The Court of Appeals' judgment reversing the judgment of the District Court was made and entered March 2, 1964 (A. 24a) and its judgment refusing a rehearing was made and entered on May 1, 1964 (A. 27a). This Court's jurisdiction is invoked under 28 U.S.C.A., Sections 1254 (1) and 2101 (c).

TERMS OF REFERENCE

"Plaintiff"—Luther Ray Rumbaugh, plaintiff in the District Court and appellant in the Circuit Court.

"Employers"—Winifrede Railroad Company, a corporation ("Railroad"), and The Carbon Fuel Company, a corporation ("Carbon"), defendants in the District Court and appellees in the Circuit Court.

"Unions"—Local Union 14182 United Mine Workers of America ("Local"), District 50 United Mine Workers of America ("District 50") and United Mine Workers of America ("UMWA"), defendants in the District Court and appellees in the Circuit Court.

"A"—Appendix to this Petition.

"R"—The Appendix Record filed in this Court.

"EA"—The Appendix to Employers' Brief in the Circuit Court.

"UA"—The Appendix to Unions' Brief in the Circuit Court.

"PA"—The Appendix to Plaintiff's Brief in the Circuit Court.

QUESTIONS PRESENTED

1. Does a discharged railroad employee, who elects to renounce any claim for reinstatement in employment, have any federal claim or cause of action under the Railway Labor Act (1) against railroad unions for discrimination alleged to have caused his discharge, and (2) against his former railroad employer for his discharge, alleged to be "unlawful," and for colluding with union to bring about his discharge?

2. Absent diversity of citizenship, does a federal district court have original subject matter jurisdiction of such action (1) against the discriminating union, and (2) against the railroad for general and punitive money damages resulting from his discharge?

3. When the complaint filed in a district court by such a discharged railroad employee for such claims further discloses on its face that plaintiff's dispute with the union and the railroad, which allegedly caused plaintiff's discharge, resulted from a disagreement between the discharged employee on the one hand and between union and railroad on the other about whether the former employee was within

the bargaining unit covered by an exhibited collective bargaining agreement made between the railroad and union, the complaint alleging plaintiff was a "non-supervisory" employee within the scope of the agreement, but admitting that railroad claimed he was a foreman and not a "non-supervisory" employee within the meaning of the term used in the contract, and determination of the merits of plaintiff's claim requires interpretation and application of the agreement, does a federal district court have original jurisdiction of the subject matter of the claim against (1) railroad, and (2) against the union? Does the National Railroad Adjustment Board have original primary jurisdiction of either or both claims?

4. Assuming the existence of a federal claim against union within the original jurisdiction of a district court, but the absence of such a federal claim against railroad; in the absence of diversity of citizenship does the court have ancillary jurisdiction of plaintiff's state claims (1) against railroad for wrongful discharge, (2) against railroad and union for conspiring to cause his discharge, and (3) against a iron carrier corporate affiliate of railroad alleged to own and control railroad and to have conspired with unions and railroad to effect plaintiff's discharge?

STATUTES INVOLVED

The statute involved is the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.) and particularly portions of Sections 151, 151a, 152 and 153 thereof. The statutory provisions considered particularly pertinent are:

"§ 151. Definitions

"When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

* * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the man

ner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

"§ 151a. General Purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly

settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions: hearings and awards

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

A. The Action

Plaintiff instituted an action in the United States District Court for the Southern District of West Virginia against Winifrede Railroad Company, a corporation, Carbon Fuel Company, a corporation, Local Union 14182 United Mine Workers of America, District 50 United Mine Workers of America and United Mine Workers of America.

The action was to recover general and punitive money damages resulting from Plaintiff's discharge by Railroad

in the amount of $300,000. Plaintiff expressly renounced any claim to reinstatement in his employment.

B. Jurisdiction in the District Court

There was no diversity of citizenship. Jurisdiction was based on the Railway Labor Act and 28 U.S.C.A. Sections 1331 and 1337 (PA 26).[1] The existence of subject matter jurisdiction in the District Court is the sole question in controversy.

C. The Complaint

Except for material omissions hereinafter noted, and the fact that the complaint seeks damages only for Plaintiff's discharge (PA 32), the opinion of the Court of Appeals, as corrected after consideration of the petitions for rehearing, summarizes Plaintiff's prolix complaint with substantial accuracy under the heading "The Complaint" (A. 8a-23a), as follows:

> **"The Complaint**
>
> "Essentially, Rumbaugh's grievance against the union is that it, as the local bargaining representative, discriminated against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge through false charges filed with his employer. His complaint against the railroad arises from allegedly false representations made to him by company officials that he was not covered by the collective bargaining agreement and his subsequent summary discharge, which he asserts was unlawful. He further charges that there was collusion between the union and his employer to effect his dismissal.
>
> "As factual support for the claims of unfair representation, wrongful discharge and conspiracy, the com-

[1] The complaint also asserted jurisdiction under "The Taft Hartley Act (29 U.S.C.A. Sec. 141-168) and 29 U.S.C.A. Sec. 101-115, and Interstate Commerce Act, 49 U.S.C.A. Sec. 1 et seq" but these assertions were abandoned in argument and were ignored by the District Court and the Court of Appeals.

plaint states that the plaintiff went to work for the railroad in 1928 as a laborer and by 1959 had risen to the position of senior mechanic. Although designated as a foreman, Rumbaugh maintains that his duty was merely to verify locomotive inspection reports, and this entailed no supervisory functions whatsoever. Even though not a member of Local 14182 United Mine Workers, the plaintiff asserts that he has been unlawfully discriminated against by the bargaining agent in rejecting all of his applications for membership, while accepting similar requests from his fellow workers. He insists that the collective bargaining agreement adopted on November 7, 1958, imposed a duty on the union to represent him fairly as one of the specified 'non supervisory men.'

"From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague. Thinking the assignment unfair, the plaintiff was moved to inquire of *company agents** about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was 'briskly informed' by the agents that no such right existed and displeased as well with changes being effected in rates of pay and work rules, Rumbaugh approached the president of Winifredo Railroad and was assured that a full investigation of the matter would be made and, if necessary, a complete hearing arranged. Neither step was ever taken. This prompted the plaintiff to inquire further of a union agent on October 14, 1959, as to the union's compliance with the statutory requirement that union-management contracts and pertinent work rules be filed with the National Mediation Board. Thereafter, on the same day, it is alleged that a union agent, conspiring with other union agents and

an officer of the railroad, filed with the employer 'charges against complainant on the false ground that he [Rumbaugh] was discriminating against the union' and requested that he be fired. The next day, October 15, 1959, Rumbaugh was summarily dismissed without explanation.

"This suit for compensatory and punitive damages totalling $300,000 was instituted to redress the claimed discriminatory, wrongful and collusive behavior of the defendants."

Material Omissions in Fourth Circuit's Summary of Complaint

The material omissions of the Court of Appeals in summarizing the allegations of the complaint are:

1. The complaint, while asserting that Plaintiff was not a supervisory employee (PA 27, 28) and that "there has been no legal determination that complainant is a supervisor" (PA 28), admits that Plaintiff had a title as "foreman" (PA 28) and that Railroad claimed he was a "supervisor" and thus not covered by the collective bargaining agreement (PA 30, 32). The collective bargaining contract, exhibited with the complaint, (EA 29) covered only "non-supervisory" employees.

2. The complaint asserts that "there was no administrative remedy available to him as the Railroad did discharge him prior to the settlement of his dispute contrary to the agreements . . . and . . . did . . . advise complainant that he had no rights under the agreements as he was a supervisory employee." (PA 30).

3. The complaint alleges that Carbon, a corporation "owned" Railroad, a corporation. It does not allege that Carbon is a carrier subject to the Railway Labor Act, but

*NOTE. In the Fourth Circuit's original uncorrected opinion, the words "a union agent" appeared here (A 10a). Other corrections are not material.

asserts Carbon is jointly liable with the other defendants because it conspired with them to effect Plaintiff's "unlawful" discharge. The Court of Appeals ignored the presence of Carbon in the case.

4. The complaint expressly renounces any claim of Plaintiff for reinstatement in his employment. (PA 30)

D. The Judgments Below

The District Court, on motions by Employers (EA 27) and Unions,[2] by order entered April 15, 1963 (A 6a) dismissed the action as to all defendants for lack of jurisdiction of the subject matter, the Court being of opinion that absent diversity of citizenship, exclusive primary jurisdiction was in the National Railroad Adjustment Board (A 1a, 213 F. Supp. 620).

On appeal by Plaintiff, the United States Court of Appeals for the Fourth Circuit, by judgment entered on March 2, 1964 (A 24a) reversed the District Court and remanded the case to the District Court for further proceedings consistent with its opinion (A 8a, 331 F. 2d 530). The Court of Appeals was of opinion that federal court jurisdiction of the subject matter of Plaintiff's claim of discrimination against Unions existed if Plaintiff was a "non-supervisory employee," and thus within the class of employees Unions had undertaken to represent and for whose benefit the collective bargaining agreement exhibited with the complaint was made (A 12a); and that the District Court should hear evidence on Plaintiff's status as a "non-supervisory" employee as that term should be interpreted and applied under the collective bargaining agreement and retain jurisdiction if it found Plaintiff was not a supervisor, but entertain a motion to dismiss if it found Plaintiff was a supervisor (A. 20a). The Court of Appeals was of opinion that

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[2]Employers and Unions also moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. Unions also filed motions attacking venue and service of process. The District Court passed only on the question of jurisdiction.

pronouncements of the Supreme Court "made it clear" that the National Railroad Adjustment Board does not have exclusive "or even concurrent" jurisdiction when a railroad employee seeks redress for union discrimination, irrespective of whether the discrimination is based on race, irrespective of the fact that interpretation and application of the collective bargaining agreement controls the disposition of the dispute and irrespective of the fact that the employee's dispute is with the railroad as well as the union and the dispute with each will be controlled by interpretation and application of the collective bargaining agreement. (A 16a et seq).

The Court of Appeals was of opinion that if there was federal court jurisdiction of the discrimination claim against Unions, there was jurisdiction of the claim against Railroad because it would be "absurd to require this closely integrated dispute to be cut up into segments." (A 17a).

The Court was further of opinion that Plaintiff's claim against Railroad for wrongful discharge and against Railroad and Unions for conspiracy, although they were common law or state claims and there was no diversity of citizenship, were within the jurisdiction of the District Court under the doctrine of pendent jurisdiction (A 22a, 23a).

REASONS FOR GRANTING THE WRIT

1. *This case presents important and fundamental questions of interpretation of the Railway Labor Act and of the scope of federal administrative and judicial power in its administration, which merit determination by this Court.*

The Fourth Circuit concludes that Plaintiff, a *discharged railroad employee who expressly renounced any claim to reinstatement in his employment*, has a *federal* cause of action solely for general and punitive money damages against Unions for discrimination and, that a federal court has "ancillary jurisdiction" of his claims against Railroad and Carbon, if the District Court finds, after remand, by interpretation and application of the collective bargaining agree-

ment between Railroad and Unions, that Plaintiff was a "non-supervisory" employee within the meaning of that term used in the agreement and was therefore, in the collective bargaining unit to whose members Unions owed a duty of representation. (A 20a)

Since *Moore* v. *Illinois Cent. R. Co.*, 312 U.S. 630, the pronouncements of this Court uniformly have been that a discharged railway employee could: (1) seek to retain his employment status and obtain a money award for back pay before the National Railroad Adjustment Board, if the dispute was one within the jurisdiction of the Board, *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601; (2) seek to retain his employment status and obtain a money award in a federal court if the Adjustment Board lacked jurisdiction of the dispute, *Brotherhood of Ry. Trainmen* v. *Howard*, 343 U.S. 768; or (3) treat his discharge as final and bring a court action for wrongful discharge *if applicable state law affords a remedy. Trans-continental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653. Where the discharged employee treats his discharge as final, there is jurisdiction of the damage action against railroad in a federal court only if diversity of citizenship exists. *Transcontinental & Western Air, Inc.* v. *Koppal*, supra, *Slocum* v. *Delaware, L. & W.R. Co.*, 339 U.S. 239.

So far as can be ascertained, this Court has never intimated, much less held, that a discharged railroad employee *who renounces any claim to or interest in reinstatement in employment*, has a federal right of action under the Railway Labor Act against his former employer, or even against a union, by reason of his discharge.

The holding of the Fourth Circuit has the effect of creating a new remedy under the Railway Labor Act for discharged railroad employees who elect to renounce any claim to reinstatement in employment, a federal right of action for damages against unions, and possibly railroads, for discriminatory discharge which will be productive of mass

litigation in federal courts; litigation which Congress never intended and which no fair reading of the Act warrants.

II. *The Fourth Circuit, in holding that the Railway Labor Act gives a discharged employee, who expressly renounces any claim to reinstatement in employment, a federal right of action for money damages against a railroad union for discrimination connected with his discharge, to which claims against railroad for unlawful discharge and conspiracy with union may be joined, interprets incorrectly prior decisions of this Court.*

The Fourth Circuit, reading *Steele* v. *Louisville & Nashville R. R.*, 323 U.S. 192, and succeeding cases involving union discrimination,[3] to establish a federal right of action in Plaintiff against Unions, if his claim were based on racial discrimination, and concluding that "invidious discrimination" even though not based on race is inhibited by the Act,[4] concluded that a federal court, absent diversity, had jurisdiction of the subject matter of Plaintiff's damage actions against Unions for causing his discharge from employment, and against Railroad for discharging him, if after interpretation of the collective bargaining agreement the District Court concluded Plaintiff was a "non-supervisory employee" within the scope of the agreement (A 20a), notwithstanding plaintiff's express election to treat his discharge as final and to abandon any claim to reinstatement in employment.

The Fourth Circuit misread *Steele* and later cases because it did not apprehend the significance of the fact that in all of those cases this Court was considering claims of railroad "*employees*" who were seeking to preserve their employment status and rights under the Act. In none of

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[3]Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768; Conley v. Gibson, 355 U.S. 41.

[4]Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4 Cir. 1963), overruling Alabaugh v. Baltimore & O. R. R., 222 F. 2d 861 (4 Cir. 1955, cert. den. 350 U.S. 839).

those cases did the Supreme Court have before it actions solely for money damages of *discharged employees who had renounced their claims to reinstatement in employment.* The reliance by the Fourth Circuit on the decision by the Second Circuit in *Cunningham* v. *Erie R. R.*, 266 F. 2d 411 (2d Cir. 1959) is also unwarranted for the same reason that *Steele* and its successor cases are inapposite. In *Cunningham*, the Court found that plaintiff *was seeking reinstatement* in his railroad employment (226 F. 2d 416) and that since he was questioning the *validity* of the collective bargaining agreement rather than the *interpretation or application* of the agreement, and since his real dispute was with union and not railroad, the Adjustment Board lacked jurisdiction. Although the complaint in the instant case expressly elects to make no claim for reinstatement in employment and to sue only for damages (PA 30) the Fourth Circuit did not consider this fact significant enough to include in its summary of the complaint.

III. *If the Fourth Circuit concluded that there was federal claim jurisdiction in the United States District Court of Plaintiff's action against Railroad, it conflicts with the rationale of prior decisions of this Court.*

The observation of the Fourth Circuit that "federal jurisdiction was not deemed destroyed by joinder of railroads in actions for discrimination in cases such as *Steele, Howard* and *Graham*" (A 17a) is inapposite because in each of those cases the Supreme Court had before it cases of railroad *employees* who were seeking to protect and retain employment status, not former employees who had elected to treat their discharge as final and sue a railroad and union for money damages. It should be further observed that in *Steele, Howard* and *Graham*[1] the Court was considering disputes which, unlike the instant case, were not properly determinable by application and interpreta-

[1] Steele v. Louisville & Nashville R. R., 323 U.S. 192; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232.

tion of collective bargaining agreements and which, also unlike the instant case, involved the employer only incidentally, joined because reinstatement in employment was sought.

As Justice Black succinctly stated in *Howard*:

> "This case raises questions concerning power of courts to protect Negro railroad employees *from loss of their jobs* under compulsion of a bargaining agreement which, to avoid a strike, the railroad made . . . [343 U.S. 769]
>
> • • •
>
> "*The claims here can not be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum* v. *Delaware L & W R. Co.* [*339 U.S. 239*]." (Emphasis supplied.)

Neither *Steele*, *Howard* nor *Graham* are authority for the proposition that there is federal jurisdiction under the Railway Labor Act of a court action of a *discharged railroad employee who expressly elects to renounce any claim to reinstatement in employment* and seeks solely to recover money damages jointly from his former employer and unions for his discharge. *Cunningham* v. *Erie R. R.*, 266 F. 2d 411, 416 (2d Cir. 1959), was also a claim of an *employee* seeking reinstatement.

It is submitted that the fundamental rationale of the *Moore doctrine*,* is that a discharged railroad employee who elects not to seek reinstatement in employment ceases to be an "employee" within the Act's definition of that term (45 U.S.C.A. § 151 Fifth) and no longer has rights or remedies under the Act by reason of his discharge, at least against his former employer. *Slocum* v. *Delaware, L. & W.*

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*Moore v. Illinois Cent. R. Co., 312 U.S. 630; Slocum v. Delaware L & W R. Co., 339 U.S. 239; Transcontinental & Western Air, Inc. v Koppal, 345 U.S. 653. See also the dissent of Justice Black in Pennsylvania R. Co. v. Day, 360 U.S. 548, 554, 555, and the majority opinion of Justice Frankfurter, 360 U.S. 548, 553, 554.

R. Co., 339 US 239, 244. Justice Black, the author of *Slocum*, recently observed that the Railway Labor Act "is to govern active workers only" and that a worker who relinquishes "all rights to return to railroad service in the future" is not an "employee" within the meaning of the Act. *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 555.

The history of the Act[7] indicates most clearly an intention on the part of the Congress to provide compulsory arbitration, rather than litigation, of all disputes between a carrier and an employee "growing out of grievances or out of the interpretation or application of" collective bargaining agreements. (45 U.S.C.A. § 153 First (i)); and the remedy of an employee in a dispute vis a vis a carrier under the Railway Labor Act is to "reinstatement and back pay," *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 552. "*The specification of one remedy normally excludes another.*" *Switchmen's Union of N. A.* v. *National Mediation Board*, 320 U.S. 297, 301; *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601, 608.

IV. *The Fourth Circuit failed to articulate with reasonable clarity the rationale of its conclusion that the District Court had jurisdiction of the claims against Railroad, and presumably Carbon.*

The Fourth Circuit at the outset of its opinion stated the jurisdictional questions as follows (A 9a):

> "• • • Since there is no diversity of citizenship between the parties, federal jurisdiction must be predicated upon a claim arising under the laws of the United States. 28 U.S.C.A. §§ 1331, 1337. No such federal question was recognized by the District Court for the Southern District of West Virginia and the complaint was dismissed for lack of jurisdiction over the subject

[7] See e.g., Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 US 30, 1 L ed 2d 622, 77 S Ct 635; Slocum v. Delaware, L. & W. Co., 339 US 239, 94 L ed 795, 70 S Ct 577; Order of R. Conductors v. Pitney, 326 US 561, 90 L ed 318, 66 S Ct 322; Elgin, J. & E. R. Co. v. Burley, 325 US 711, 89 L ed 1886, 65 S Ct 1283.

matter, the District Court holding that exclusive jurisdiction was in the Railroad Adjustment Board.

"This disposition of plaintiff's claims raises two fundamental jurisdictional questions. First, is there federal court jurisdiction over an *employee's* suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit which the union is statutorily obligated to represent? Second, does an *employee* have such a federal claim against his employer for wrongful discharge that jurisdiction will lie in a federal court regardless of citizenship of the parties." (Emphasis supplied. The Court misused the term.)

The Fourth Circuit answered the second question in the negative "unless the judicially created doctrine of 'pendent jurisdiction' may be invoked." (A 21a) And in its per curium opinion refusing rehearing, the Court said: "We concluded that there was original jurisdiction of the claim for breach of the duty of fair representation and, further that there was ancillary jurisdiction of the remaining claims." (A 26a)

Employers concede this construction of the Fourth Circuit's opinion appears inconsistent with its conclusions that the District Court had pendent jurisdiction of the state common law claims against Railroad and Carbon for wrongful discharge and conspiracy, because the Fourth Circuit admits pendent jurisdiction can be properly invoked only because "Both the federal and the nonfederal claims are asserted by the same plaintiff against the same defendants." (A 22a). The holding of the Court of Appeals is further confused by the Court's discussion of "ancillary jurisdiction" in the context of *Cunningham* v. *Erie R. R.*, supra, and Rule 20(a) of the Federal Rules of Civil Procedure (A 17a, 18a). The citation of Rule 20 (a) in *Conley* v. *Gibson*, 355 U.S. 41, was not inappropriate in that case because the "employees" there had not elected to renounce their federal right to reinstatement in employment.

Here the plaintiff, having elected to treat his discharge as final, has no federal claim against Railroad and Carbon, and Rule 82 of the Rules of Civil Procedure provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

The doctrine of ancillary jurisdiction may have been applicable to retain the railroad as a party in *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir. 1959) because the Court had before it a claim of a railroad "employee" who sought reinstatement in employment, but this Plaintiff has elected to abandon such a claim.

V. *The Fourth Circuit erroneously applied the doctrine of "pendent jurisdiction."*

The Fourth Circuit itself admits that the doctrine of pendent jurisdiction applies only when "Both the federal and non federal claims are asserted by the same plaintiff against the same defendants." (A 22a)

Although there is disagreement in many courts in applying the single cause of action test of *Hurn* v. *Oursler*, 289 U.S. 238, there is general consensus "that pendent jurisdiction is not to be employed as a device for bringing in parties not necessary for determination of the federal question."[*] Since Plaintiff has no federal claim against Railroad or Carbon, and their presence is not required to determine the federal question or to grant the relief which plaintiff seeks, no basis for pendent jurisdiction exists.

Nor can it be fairly said that there is one "cause of action" here or that "substantially the same state of facts"

[*]Note. The Evaluation and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Columbia Law Review 1018, 1027.

will dispose of the federal claims of union discrimination, and the state claims of breach of contract and conspiracy.*

VI. *If Plaintiff has a federal claim under the Railway Labor Act, it is one subject to the original primary jurisdiction of the National Railroad Adjustment Board.*

If Plaintiff had not elected to renounce his claim to reinstatement in employment, or if the Fourth Circuit is correct in its apparent conclusion that his election did not materially affect his rights under the Railway Labor Act, the dispute here is one which Congress by 45 U.S.C.A. Sec. 153 First (i) has committed to the original primary jurisdiction of the National Railroad Adjustment Board.

Plaintiff claims that he was a "non-supervisory" employee and as such was within the bargaining unit for which Unions acted in making the exhibited collective bargaining agreement with Railroad, while expressly admitting in his complaint that Railroad gave him a title as "foreman" and claims that he was a supervisory employee and not within the application of the agreement which, by its terms, covered "non-supervisory" employees. The Fourth Circuit not only acknowledges that such a dispute existed, but it directed the District Court, on remand, to interpret and apply the agreement to the facts and ascertain if plaintiff was a "non-supervisory employee," and entertain a new motion to dismiss if he were a supervisor (A 20a).

The Fourth Circuit reasoned that although there was a dispute between Plaintiff and Railroad concerning the application and interpretation of the agreement, since Plain

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*Hurn v. Oursler, 289 U.S. 238; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315; French Renovating Co. v. Ray Renovating Co., 170 F. 2d 945 (6 Cir. 1948); New Orleans Pub. Belt R.R. v. Wallace, 173 F. 2d 145 (5th Cir. 1949) (Common law claim of negligence against one defendant and claim under Federal Employers Liability Act against another defendant are separate causes of action); Pearce v. Pennsylvania R.R., 162 F. 2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947) (same); *cf.* Sullivan v. United States, 120 F. Supp. 217 (N.D. Ill. 1954) (Federal Tort Claims Act); 62 Columbia Law Review 1018, Hart & Wechsler, The Federal Courts and the Federal System, 802.

tiff and Unions were in a dispute involving the same question of application and interpretation of the agreement, and Plaintiff alleged Unions "discriminated against him," "pronouncements of the Supreme Court make it clear that the Adjustment Board does not have exclusive, or even concurrent jurisdiction . . ." (A. 16a, 17a).

The Fourth Circuit's reading of *Steele* and later cases which it cites (A 16a, fn. 7) in support of its conclusion is not a sound reading. In those cases will be found some language consistent with the Fourth Circuit's conclusion, but they were all cases in which the *validity* of the agreement rather than its interpretation was the issue or cases in which there was no real dispute between the plaintiff and railroad, but only between plaintiff and union. In *Steele* the Court was careful to observe that there were no "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 205.

The Act, 45 U.S.C.A. Sec. 153, First (i), read literally speaks only of "The disputes between an employee or group of employees and a carrier or carriers . . .". But where, as here, a discharged employee is complaining about his discharge by the carrier, and the discharge is not alleged to have been required by an invalid agreement, but on the contrary, the merits of the discharged employee's dispute with the carrier and the union will be resolved by interpretation and application of the agreement, the Fourth Circuit's reading of the Act deprives the carrier of a right expressly given it by Congress, and is contrary to *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38; *Order of R. Conductors* v. *Southern R. Co.*, 339 U.S. 255, 256, 257; *Slocum* v. *Delaware, L & W. R. Co.*, 339 U.S. 239; and *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548.

The Fourth Circuit's reading of the Act would deprive the Railroad Adjustment Board of jurisdiction, *at the elec*

tion of an employee, whenever a union agreed with a carrier's interpretation and application of a collective bargaining agreement and an affected employee was in disagreement, thus producing an employee-union as well as an employee-carrier dispute. All such three party disputes about the interpretation and application of collective bargaining agreements could then be taken, *at the election of the employee* to the Adjustment Board *or* to a United States District Court.

VII. *The holding of the Fourth Circuit that the National Railroad Adjustment Board lacked jurisdiction is in conflict with decisions in other circuits.*

In holding the Railroad Adjustment Board lacked jurisdiction, the Fourth Circuit is in conflict with opinions of the Third Circuit in *Roberts* v. *Lehigh & New England Ry. Co.*, 323 F. 2d 219, 222 (1963), the Fifth Circuit in *Britton* v. *Atlantic Coastline R. Co., et al.*, 303 F. 2d 274 (1962), and the Seventh Circuit in *Pickett* v. *N. Y. Central R. R. Co., et al.*, decided June 17, 1964, and reported in 56 L.R.R.M. 2520.

CONCLUSION

For the reasons assigned, Petitioners pray that their Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, entered in Case No. 9022 on March 2, 1964.

Respectfully submitted,

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July 15, 1964

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

Civil Action No. 2478

LUTHER RAY RUMBAUGH,
Plaintiff,

v.

WINIFREDE RAILROAD COMPANY, a corporation;
THE CARBON FUEL COMPANY, a corporation;
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA;
DISTRICT 50 UNITED MINE WORKERS OF AMERICA; AND
UNITED MINE WORKERS OF AMERICA,
Defendants.

Opinion

In this action the plaintiff seeks to recover damages from the defendant corporations for his alleged wrongful discharge and joins the defendant Union for its alleged discrimination against him in procuring his discharge. He alleges that this Court should take jurisdiction of the action by virtue of the provisions of the Railway Labor Act, the Taft-Hartley Act and the Interstate Commerce Act. The defendants have moved to dismiss the complaint on various grounds but it is necessary to consider only the question of this Court's jurisdiction over the subject matter of this action.

First, and of paramount importance, is the fact that this is not an action based upon diversity of citizenship. There is no allegation of diversity jurisdiction in the complaint, and on its face it is clearly evident that the requisites for such jurisdiction are lacking. This lack of diversity is important in the light of the statement in the complaint that the plaintiff has elected to treat his discharge as final and sue for damages for wrongful discharge. It is now well settled that an employee, alleging his wrongful discharge,

may, if he chooses, challenge the validity of his discharge before the Adjustment Board under the provisions of the Railway Labor Act or, in the alternative, treat such discharge as final and resort to the courts. However, if he comes into a federal court, jurisdiction necessarily rests upon diversity of citizenship and the law of the forum state is applied. *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630; *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653; see also *Hilton* v. *Norfolk and Western Railway Company*. 194 F. Supp. 915. The benefit of this exception to the primary jurisdiction of the Adjustment Board is not available to the plaintiff here by reason of the patent lack of diversity between the parties.

Plaintiff contends, however, that the alleged discriminatory participation by the defendant Union presents a state of facts that entitles him to seek redress in the federal courts, and relies strongly upon the Second Circuit decision in *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411. It is true that *Cunningham* recognized an extension of federal jurisdiction in this area which had its genesis in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, and the companion case of *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210. In considering a proposed amendment to the collective bargaining agreement which would have excluded all Negro firemen from service, the Court in *Steele* observed that the Railway Labor Act cast upon a union the duty "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." In that case the Court concluded that since the administrative remedies under the Act were not available in a dispute between employees and their representative, the grievance of the employees for breach of the statutory duty by the union was of judicial cognizance. The companion *Tunstall* case likewise involved alleged discrimination by the union against certain Negro employees, and the great majority

of the cases which followed in the wake of *Steele* v. *Louisville & Nashville* dealt with discrimination based upon race or color. In cases involving alleged discriminatory practices under circumstances other than those involving race or color, many of the courts refused to extend the scope of this exception to the primary or exclusive administrative jurisdiction of the Adjustment Board under the Act. The Fourth Circuit took this restrictive viewpoint in *Spires* v. *Southern Railway Co.*, 204 F. 2d 453, and *Alabaugh* v. *Baltimore and Ohio Railroad Co.*, 222 F. 2d 861. In the latter case, Judge Parker, in commenting upon *Steele* and *Tunstall*, stated at pages 866 and 867:

> "• • • but those cases dealt with racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle.
>
> "• • • Logically it may seem that if a court has jurisdiction to protect rights against racial discrimination it should have jurisdiction to protect them against discrimination on account of union membership; but the answer is that the Adjustment Board was not set up to deal with racial controversies, but controversies arising out of labor relationships."

Admittedly, however, in cases where the crux of the controversy involves a charge of discrimination by the employee against his union representative rather than a controversy between an employee or his union vis-a-vis the railroad, the current of judicial authority in this area has trended in the direction of the *Cunningham* case. See *Latham* v. *Baltimore and Ohio Railroad Company*, 274 F. 2d 507; *Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604; *Nobile* v. *Woodward*, 200 F. Supp. 785.

Some indication of this acceptance of the principle of *Cunningham* has appeared in the Fourth Circuit in the Dis-

trict Court opinion in *Hostetler* v. *Brotherhood of Railroad Trainmen*, 183 F. Supp. 281, and in the dissenting opinion of Judge Bryan in the same case on appeal in 287 F. 2d 457, at page 463 where he observed:

> ". . . . A strict, constant and delicate sensibility of the bargaining representative to its trust has repeatedly been enjoined upon the union by the Supreme Court. Conley v. Gibson, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. That the factual basis of these cases was race or color does not in the slightest dilute the unequivocal command of fairness they give the bargaining agent."

However in *Chapman* v. *Local* 104 *of International Association of Machinists*, 199 F. Supp. 186, Judge Watkins recognized the conflict between *Cunningham* and *Alabaugh* and concluded that in this Circuit the District Court was bound to follow the restrictive concept of *Alabaugh*.

In any event, however, the *Cunningham* case is of no assistance to the plaintiff here for it could have no application upon the record in this case. In *Cunningham* as well as the other cases in this area, the thrust of the plaintiff's case was directed primarily, if not exclusively, against his Union representative, and the position of the Railroad in the pattern of litigation was merely incidental by reason of the collective bargaining agreement. The Railroad is ordinarily a party in such a suit only because the plaintiff seeks a reinstatement of his employment status or restoration of certain rights thereunder. See *Latham* v. *Baltimore and Ohio Railroad Company* and *Nobile* v. *Woodward*, *supra*. The nature of the litigation is such that the Railroad was not considered an indispensable party in *Conley* v. *Gibson*, 355 U.S. 41. In the latter case the nature of the controversy as the basis for federal jurisdiction and the posture of the Railroad therein was stated as follows at page 44:

"* * * This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination. Furthermore, the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent."

The prolix and ambiguous complaint in the present case goes far afield from a mere complaint of alleged discriminatory treatment of the plaintiff by the Union representative in exercising its authority by virtue of the Act; and it would cast the defendant corporations in a position far different from that of innocent bystanders whose presence is merely incidental by reason of the collective bargaining agreement. It alleges that the defendant corporations actively conspired with the Union to bring about plaintiff's discharge, and charges that the Railroad controlled the Union in a manner that was detrimental and discriminatory toward the employees. The plaintiff does not seek a determination or restoration of his employee status, but rather asks to recover damages for his wrongful discharge. A distillation of the plaintiff's allegations indicates that they are nothing more than a complaint for an unlawful discharge from his employment or a conspiracy upon the part of the defendants to commit a common law tort against the plaintiff. Jurisdiction of these causes of action cannot be entertained by this Court in the absence of diversity of citizenship between the parties. Accordingly, the motions to dismiss will be granted.

Order and Judgment

On this the 15th day of April, 1963, again came plaintiff Luther Ray Rumbaugh, by William F. Carroll, E. Franklin Pauley and Edwin M. Young, his attorneys; defendant Winifrede Railroad Company, a corporation, by F. Paul Chambers, its attorney; The Carbon Fuel Company, a corporation, by James Knight Brown, its attorney; and also came defendant Local Union 14182, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; defendant District 50, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; and defendant United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; each of said defendant unions appearing specially and not generally; and thereupon this cause came on for determination upon the bill of complaint, the respective written motions of defendant Winifrede Railroad Company and defendant The Carbon Fuel Company to dismiss the action, and the respective written motions to dismiss, to quash summons and service thereof and return of service thereon and notices of motion of defendant Local Union 14182, United Mine Workers of America, defendant District 50, United Mine Workers of America, and defendant United Mine Workers of America, respectively, together with the affidavit of Thomas Kennedy and the exhibits attached thereto and the affidavit of Edward Hunter, filed in support of said motions, all of which, if not heretofore filed, are ORDERED filed as a part of the record in this case; and the Court having heretofore heard oral arguments by said parties and having maturely considered the same, as well as written briefs filed by each of the respective parties, and being of opinion for the reasons set forth in a written opinion dated January 29, 1963, which is ORDERED filed as a part of the record herein, that there is no diversity of citizenship and that this Court is without jurisdiction over the subject matter of this action, and that each of said motions to dismiss should be sustained,

It is therefore ORDERED that each of the several motions to dismiss said complaint and action filed by the defendants herein be and the same are hereby sustained; that plaintiff take nothing by his action and complaint; that said action be dismissed and removed from the docket, and that each of the defendants recover against said plaintiff its costs. To which counsel for plaintiff excepts.

APPENDIX B

Filed March 2, 1964

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued September 27, 1963. Decided March 2, 1964.)

Before SOBELOFF, Chief Judge, BOREMAN, Circuit Judge, and NORTHROP, District Judge.

Edwin M. Young (E. Franklin Pauley on brief) for Appellant, and F. Paul Chambers (James K. Brown and Jackson, Kelly, Holt & O'Farrell on brief) for Appellees Winifrede Railroad Company and Carbon Fuel Company, and M. E. Boiarsky for Appellees Unions.

SOBELOFF, Chief Judge:

This is another in the succession of cases since *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), involving

interpretation of the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, and determination of the scope of federal judicial power in its administration.

Rumbaugh has joined his former employer, Winifrede Railroad Company, and the union designated as the bargaining representative for local railroad employees as co-defendants in an action to recover damages allegedly caused by the independent and combined efforts of the defendants to effect his discharge. Since there is no diversity of citizenship between the parties, federal jurisdiction must be predicated upon a claim arising under the laws of the United States 28 U.S.C.A. §§ 1331, 1337. No such federal question was recognized by the District Court for the Southern District of West Virginia and the complaint was dismissed for lack of jurisdiction over the subject matter, the District Court holding that exclusive jurisdiction was in the Railroad Adjustment Board.

This disposition of plaintiff's claims raises two fundamental jurisdictional questions. First, is there federal court jurisdiction over an employee's suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit which the union is statutorily obligated to represent? Second, does an employee have such a federal claim against his employer for wrongful discharge that jurisdiction will lie in a federal court regardless of the citizenship of the parties?[1]

THE COMPLAINT

Essentially, Rumbaugh's grievance against the union is that it, as the local bargaining representative, discriminated

[1] An affirmative answer to either question could well enable plaintiff to resort to a federal forum since, under the doctrine of pendent jurisdiction, a federal court's jurisdiction based on a federal claim extends to any nonfederal claim in the case if the claims constitute a single cause of action. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L.Rev. 1018 (1962); *cf. United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F.2d 52, 59-60 (6th Cir.), *cert. denied* 359 U.S. 1013 (1959).

against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge through false charges filed with his employer. His complaint against the railroad arises from allegedly false representations made to him by company officials that he was not covered by the collective bargaining agreement and his subsequent summary discharge, which he asserts was unlawful. He further charges that there was collusion between the union and his employer to effect his dismissal.

As factual support for the claims of unfair representation, wrongful discharge and conspiracy, the complaint states that the plaintiff went to work for the railroad in 1928 as a laborer and by 1959 had risen to the position of senior mechanic. Although designated as a foreman, Rumbaugh maintains that his duty was merely to verify locomotive inspection reports, and this entailed no supervisory functions whatsoever. Even though not a member of Local 14182 United Mine Workers, the plaintiff asserts that he has been unlawfully discriminated against by the bargaining agent in rejecting all of his applications for membership, while accepting similar requests from his fellow workers. He insists that the collective bargaining agreement adopted on November 7, 1958, imposed a duty on the union to represent him fairly as one of the specified "non-supervisory men."

From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague. Thinking the assignment unfair, the plaintiff was moved to inquire of a union agent about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was "briskly informed" by the agent that no such right existed and displeased as well with changes being

effected in rates of pay and work rules, Rumbaugh approached the president of Winifrede Railroad and was assured that a full investigation of the matter would be made and, if necessary, a complete hearing arranged. Neither step was ever taken. This prompted the plaintiff to inquire further of the union agent on October 14, 1959, as to the union's compliance with the statutory requirement that union-management contracts and pertinent work rules be filed with the National Mediation Board. Thereafter, on the same day, it is alleged that a union agent, conspiring with other union agents and an officer of the railroad, filed with the employer "charges against complainant on the false ground that he [Rumbaugh] was discriminating against the union" and requested that he be fired. The next day, October 15, 1959, Rumbaugh was summarily dismissed without explanation.

This suit for compensatory and punitive damages totalling $300,000 was instituted to redress the claimed discriminatory, wrongful and collusive behavior of the defendants.

CLAIM AGAINST THE UNION

Duty of Fair Representation

Since the landmark case of *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the principle has become unchallengeable that the federal courts have subject-matter jurisdiction to enforce the judicially-created duty imposed upon bargaining agents to represent all employees in the bargaining unit fairly and without racial discrimination.[2] Originally this court in *Alabaugh* v. *Baltimore & O. R.R.*, 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1955), adopted the view that federal jurisdiction over alleged violations of the "duty of fair representation" was re-

[2]See also *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *cf. Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955).

stricted to cases of racial discrimination. The District Court, following this guide, declined to give weight to what it recognized to be "the current of judicial authority" toward expansion of the union's obligation to include all forms of hostile treatment and discrimination regardless of race.[3]

While the District Court's conclusion, when rendered, was consistent with the position theretofore taken by this court, it does not reflect the broader principle which we subsequently announced in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963). There we specifically stated that *Alabaugh* "represents too narrow a view" and that the judicially enforceable duty of fair representation "should be interpreted as also prohibiting invidious discrimination that is not based upon race." *Id.* at 198. Thus we held that an allegation of breach of the statutory duty, even if not based upon racial discrimination, is within the jurisdiction of the federal courts.

Membership in the Bargaining Unit

We also recognized in *Thompson* that no less protection should be afforded to an aggrieved non-union member who is within the bargaining unit for which the union is the bargaining agent than is afforded to a member of the union.[4] Because the duty extends only to those employees whom the union is empowered to represent and because a union cannot be expected to look after the needs and demands of workers who are not covered by the collective bargaining agreement, an employee must establish, as part of his case, that he is a member of the designated bargaining unit.

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[3] See *Humphrey* v. *Moore*, 32 U.S.L.W. 4055, 4057 (January 7, 1964); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 198 n.15 (4th Cir. 1963); Blumrosen, "The Worker and Three Phases of Unionism," 61 Mich. L. Rev. 1435, 1470 (1963).

[4] See also *Conley* v. *Gibson*, 355 U.S. 41, 42 (1957); *Syres* v. *Oil Workers Int'l Union*, 350 U.S. 892, *affirming* 223 F.2d 739, 742-43 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255 (1944); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 197 (4th Cir. 1963); *Hostetler* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 457, 458 (4th Cir. 1961).

Rumbaugh maintains that the union's duty of fair representation extends even further. His theory is that when discrimination is alleged, the complainant's status relative to the bargaining unit is immaterial. As support for this contention he cites *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). But in that case the Supreme Court rejected the proposition that *Steele's* prohibition against racial discrimination was inapplicable because the plaintiffs, train porters, were not designated as brakemen, the class of employees represented by the Brotherhood. The Court said that the central issue was the legality of the collective bargaining agreement which the white union had secured and which had the effect of requiring the carrier to eliminate all Negro train porters and substitute white brakemen in their places.

We agree that the Court disregarded the artificial classification of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification. The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as "employees" within the meaning of the Railway Labor Act.

The union's position is that Rumbaugh is not within the unit it represents, because he is a supervisor. It contends that exclusive jurisdiction to determine his employment classification (*i.e.*, whether he is a supervisor or a non-supervisor) lies either with the National Railroad Adjustment Board as a question arising "out of the interpretation or application of agreements," 45 U.S.C.A. § 153 First (i), or with the National Mediation Board as a dispute concerning craft classification or representation, 45 U.S.C.A. § 152 Ninth.

Rumbaugh's rejoinder is that the complaint, the well-pleaded facts of which are to be taken as true for purposes of the motion to dismiss, establishes his non-supervisory status when it avers that:

> "He was an hourly paid employee with no authority to hire, fire or discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports."

Rumbaugh makes the point that the District Court should at least have heard evidence on the issue of his employment status before concluding that the allegations of the complaint are insufficient to establish federal jurisdiction.

The general principle that pleadings are to be liberally construed was applied in *Priest* v. *Chicago, R.I. & P. R.R.*, 189 F.2d 812 (8th Cir. 1951), a case strikingly similar to the one at hand. There a discharged railroad metal worker brought suit against his former employer, alleging *inter alia*, that the carrier and the union had discriminated against him by disregarding his superior seniority rights and effecting his discharge because of his membership in another union. The plaintiff prayed for monetary damages, reinstatement and an injunction. The defendant answered that exclusive jurisdiction lay in the National Railroad Adjustment Board because the dispute was between an employee and a carrier growing out of the interpretation or application of a collective agreement. The District Court adopted the union's view without holding a hearing and granted its motion to dismiss for lack of jurisdiction. The Court of Appeals reversed.

> "It seems probable that when this case is tried the evidence will show that the plaintiff was never discharged, but was, as the defendant asserts, merely laid off or furloughed, due to a reduction of force, and

that the controversy involves only the interpretation and application of the collective bargaining agreement referred to in the complaint." *Id.* at 815.

In spite of this the court found itself unable to say "to a legal certainty" that there was no jurisdiction and therefore held that "the District Court should not have attempted to decide the question of its jurisdiction from allegations of the complaint and of the motion to dismiss, but should have taken evidence to show the exact factual basis for the plaintiff's claim before ruling upon the question of jurisdiction."

Postponement of the final resolution of the jurisdictional problem until the District Court has had an opportunity to sound the complaint for its underlying factual and legal bases, as was done in *Priest* and other cases,[4] was required in the present action unless it were clear from the pleadings that, in so doing, the federal court would usurp the statutory power of the administrative agencies created by the Railway Labor Act. In this regard the union calls attention to the specific wording of the Act and to court decisions which, it says, indicate that exclusive competency is with either the National Railroad Adjustment Board or the National Mediation Board rather than with the federal courts to determine whether a discharged railroad employee was, prior to his release, a member of the bargaining unit which the union was duty-bound to represent. We disagree with the union's interpretation for the reasons now to be stated.

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[3] Ours is not a case where the complaint presents only conclusions of fact unsupported by allegations of specific facts upon which the conclusions rest such that the facts cannot be regarded as well pleaded. See *Homan Mfg. Co.* v. *Russo*, 233 F.2d 547, 550 (7th Cir. 1956); *Rishel* v. *Pacific Mut. Life Ins. Co.*, 78 F.2d 881, 886 (10th Cir. 1935).

Nor is it a case of legal conclusions cast in the form of factual allegations. See *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960).

[4] See *Brotherhood of Railroad Trainmen* v. *Central of G. Ry.*, 305 F.2d 605 (5th Cir. 1962); *Koelker* v. *Baltimore & O. R.R.*, 140 F. Supp. 887, 890 (E.D. Pa. 1956); *Hawn* v. *American S.S. Co.*, 26 F. Supp. 428 (W.D.N.Y. 1939) (evidence of plaintiff's status as a "seaman").

Employee-Union Disputes Not for the Railroad Adjustment Board

Section 153 First(i) of 45 U.S.C.A. provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, • • • may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board • • •."

The plain meaning of this section is that the Board is charged with the responsibility of adjudicating controversies between employees and their employer, the carrier, and not those involving employees and their bargaining representative. This interpretation has been reiterated many times since the Supreme Court's landmark decision in *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), where this section was interpreted as follows:

> "Section 3, First (i) [45 U.S.C.A. § 153 First (i)], which provides for reference to the Adjustment Board of 'disputes between an employee or group or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to disputes between employees and their representative." *Id.* at 205.

Later cases have followed this reading of the statute.[1]

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[1] *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 239 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Order of Railway Conductors* v. *Southern Railway*, 339 U.S. 255 (1950); see *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 550 (1959); *Haley* v. *Childers*, 314 F.2d 610, 615-17 (8th Cir. 1963); *Gainey* v. *Brotherhood of Ry. & S.S. Clerks*, 275 F.2d 342, 344 (3d Cir. 1960); cf. *Pelter* v. *Southern Pac. Co.*, 359 U.S. 326, 327 n.3 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963); *Britton* v. *Atlantic C. L. R.R.*, 303 F.2d 274 (5th Cir. 1962); *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961).

The union, however, asserts that two Supreme Court decisions cast doubt on the above-stated rule. But we think that the Court in these

(Footnote continued on next page)

These pronouncements of the Supreme Court make it clear that the Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment.

Nor do we find that the joinder of the railroad as a defendant in this claim changes the situation. In the first place, federal jurisdiction was not deemed destroyed by joinder of railroads in actions for discrimination in cases such as *Steele*, *Howard* and *Graham*. And in *Cunningham* v. *Erie R.R.*, 266 F.2d 411 (2d Cir. 1959), a suit for discrimination brought by a former employee against the union and the employer, the court said at page 416:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it also has power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."

There the employee's grievance, asserted against both the union and the railroad, was that he was "discriminatorily

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cases took great pains to reaffirm *Steele* and its interpretation of the statute. In the first, *Slocum* v. *Delaware, L. & W. RR.*, 339 U.S. 239 (1950), the Court held that a dispute between two unions concerning the scope of their respective agreements could not be resolved in a state court on a motion by the railroad for a declaratory judgment because such controversies are within the exclusive competency of the Adjustment Board, the agency authorized to settle "railroad-employee disputes growing out of the interpretation of existing agreements." *Id.* at 243. But in an accompanying footnote, id. at 244 n.7, the Court emphasized that "[W]e are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative as in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192."

In a second case, *Conley* v. *Gibson*, 355 U.S. 41 (1957), it was stated that:

> "This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. [footnote omitted] The Adjustment Board has no power under § 3 First(i) or any provision of the Act to protect them from such discrimination."

Specific reference to the jurisdictional distinction between employee-employer suits and employee-bargaining agent actions was again made, the Court stating in footnote 4, page 44, "[f]or this reason the decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, is not applicable here."

discharged." The court held that the presence of the railroad as a party defendant did not defeat federal court jurisdiction because exclusive Adjustment Board jurisdiction extends only to employee-employer disputes and since the railroad was "brought in only because it claimed it was required by law to discharge persons who had been removed as members of the union for non-payment of dues," the controversy was essentially between the employee and the union, with the railroad only incidentally involved. We think the principle applicable in the present case. Rumbaugh has joined the railroad to his discrimination charge only because he is claiming that, in consequence of its active participation in the union's discriminatory conduct, he was unlawfully discharged. For this reason the *Cunningham* holding is apposite.[2]

Furthermore, *Cunningham* is in accordance with the salutary principles of avoiding a multiplicity of suits and expediting the final determination of litigation which are the foundation of Rule 20(a), Fed. R. Civ. P. Because a railroad is not an indispensable party to an employee's action against the union for invidious discrimination, as the Supreme Court held in *Conley* v. *Gibson*, 355 U.S. 41 (1950), the joinder is permissive and is governed by the following standard:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action . . ." Rule 20(a), Fed. R. Civ. P.

Under this rule joinder of parties-defendant is governed by the concepts of "same transaction" and "common

[2] Later in this opinion we deal with the separate claim against the railroad for wrongful discharge.

question of law or fact.'" The allegations here satisfy these requirements.

Judicial Interpretation of the Collective Agreement Is Not Forbidden

Though resolution of the issue whether or not Rumbaugh is a supervisor may require an interpretation of the collective bargaining agreement, the federal courts are not ousted from their function merely because, under certain circumstances, interpretation is delegated to the Board. Here, as we have shown, the Board lacks jurisdiction. This being so, and the cause of action for invidious discrimination being cognizable by the federal courts, they have the power—and the duty—to interpret the agreement. Otherwise there would be no forum, judicial or administrative, competent to grant relief.

Jurisdiction of the National Mediation Board

We also find that the National Mediation Board is without jurisdiction over this case. The Railway Labor Act, 45 U.S.C.A. § 152 Ninth, provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees * * * it shall be the duty of the Mediation Board, upon request of either party to the dispute,

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[1] See generally 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 533 (1961); 3 MOORE, FEDERAL PRACTICE par. 20.06 (1948); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'Transaction' [as used in Rule 20(a)] is a word of flexible meaning. It may comprehend a series of many occurrences * * *.")

[2] See *Heisler* v. *Parsons*, 312 F.2d 172, 176 (7th Cir. 1962); cf. *Virginian Ry* v. *System Fed'n No. 40*, 300 U.S. 515 (1937); *Brotherhood of Locomotive Firemen* v. *Northern Pac. Ry.*, 274 F.2d 641 (8th Cir. 1960); *Switchmen's Union* v. *Southern Pac. Co.*, 253 F.2d 81 (9th Cir. 1957); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic C. L. R.R.*, 201 F.2d 36 (4th Cir. 1953).

The fact that interpretation of collective agreements was involved has not in the past prevented courts from retaining jurisdiction of actions to enforce the duty of fair representation. *Conley* v. *Gibson*, 355 U.S. 41, 44-45 (1957); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 199 (4th Cir. 1963).

to investigate such dispute and to certify to both parties * * * the name or names of the individual or organizations that have been designated and authorized to represent the employees * * * ."

The case of *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 323 (1943), makes it clear that the jurisdiction of the National Mediation Board is limited to disputes between rival employee representatives." The Board is limited to resolving jurisdictional disputes and settling controversies between unions as to where "the authority of one craft ends and the other begins or of the zone where they have joint authority." *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323, 334-35 (1943). The Board's jurisdiction does not extend to controversies, such as the one now under consideration, between an employee and his bargaining agent.

Since neither the Railroad Adjustment Board nor the National Mediation Board is the proper forum for this case, we hold that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction without first hearing evidence on the question of Rumbaugh's employment status. Should the District find, after examining the facts, that Rumbaugh was not a supervisor, then the action for invidious discrimination should be heard on the merits. Should it find that he was a supervisor, and therefore not within the unit represented by the union, a motion to dismiss could then properly be entertained.

See, e.g., *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943); *Flight Eng'rs Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745, 747 (2d Cir. 1963); *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F.2d 17, 19-20 (4th Cir. 1962); *Hester* v. *Brotherhood of Railroad Trainmen*, 206 F.2d 279 (8th Cir. 1953); *Brotherhood of Railway & S.S. Clerks* v. *Atlantic C.L. R.R.*, 201 F.2d 36, 38-39 (4th Cir. 1953); *O'Donnell* v. *Pan American World Airways, Inc.*, 200 F.2d 929, 931 (2d Cir. 1953); *Rose* v. *Brotherhood of Railway & S.S. Clerks*, 181 F.2d 944, 946 (4th Cir. 1950); *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't*, 93 F.2d 340 (6th Cir. 1937); *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F.2d 757 (D.C. Cir. 1936).

CLAIM AGAINST THE RAILROAD

Relying upon the established doctrine that a discharged railroad employee may at his option challenge the validity of his discharge before the Railroad Adjustment Board and seek reinstatement and back pay or, after accepting the dismissal as final, bring a civil suit against the railroad for unlawful discharge,[12] Rumbaugh further asserted in his complaint that he was electing to pursue the latter course. He also joined the union as a defendant because it wrongfully procured his discharge by the railroad.

While it is indisputable that a claim for wrongful discharge is judicially cognizable, an action of this type is essentially one at common law for breach of contract and does not arise under the Railway Labor Act. Consequently, original federal jurisdiction can attach only when there is diversity of citizenship.[13] Since, as the District Court found, there is a "patent lack of diversity between the parties," no federal jurisdiction exists over Rumbaugh's claim for wrongful discharge unless the judicially created doctrine of "pendent jurisdiction" may be invoked.

The origin of this doctrine is generally attributed to the case of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). In broad terms it provides that original jurisdiction resting on the plaintiff's federal claim extends to any nonfederal claim that he may have against the same defendant provided

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[12] *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653 (1953); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Moore* v. *Illinois Cent. R.R.*, 312 U.S. 630 (1941); see, *e.g.*, *Roberts* v. *Lehigh & N. E. Ry.*, 323 F.2d 219, 223 n.5 (3d Cir. 1963); *Haley* v. *Childers*, 314 F.2d 610, 614-15 (8th Cir. 1963); *Cook* v. *Missouri Pac. R.R.*, 263 F.2d 954, 957 (5th Cir. 1959); *Cranston* v. *Baltimore & O. R.R.*, 258 F.2d 630, 631 (3d Cir. 1958); *Condol* v. *Baltimore & O. R.R.*, 198 F.2d 400 (D.C. Cir. 1952); *Cepero* v. *Pan American Airways, Inc.*, 195 F.2d 453 (1st Cir. 1952).

[13] *Duplisea* v. *Maine Cent. R.R.*, 260 F.2d 495 (1st Cir. 1958); *Stack* v. *New York Cent. R.R.*, 258 F.2d 739, 741-42 (2d Cir. 1958); *Smithey* v. *St. Louis S. Ry.*, 237 F.2d 637 (8th Cir. 1956); *Broady* v. *Illinois Cent. Ry.*, 191 F.2d 73, 78 (7th Cir.), cert. denied, 342 U.S. 897 (1951); *Bohannon* v. *Reading Co.*, 168 F. Supp. 662 (E.D. Pa. 1958); see generally Kroner, "Minor Disputes Under the Railway Labor Act," 37 N.Y.U. L. Rev. 41, 59 (1962).

that the federal question is substantial and the two claims together constitute a "single cause of action."[14] Application of the doctrine is appropriate in this case. Both the federal and the nonfederal claims are asserted by the same plaintiff against the same defendants.[15] The complaint presents one set of operative facts to support the two claims, thereby stating a "single cause of action."[16] Furthermore, it cannot be said that the federal claim is "obviously without merit," or clearly foreclosed by prior Supreme Court decisions,[17] or a matter that should be dismissed on the pleadings alone without presentation of some evidence.[18] By any of these standards of substantiality, Rumbaugh has alleged a nonfrivolous claim.[19]

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[14] See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938); *Lincoln Gas & Elec. Light Co.* v. *City of Lincoln*, 250 U.S. 256 (1919); *Siler* v. *Louisville & N. R.R.*, 213 U.S. 175 (1909); *Taussig* v. *Wellington Fund, Inc.*, 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963), noted in 49 Va. L. Rev. 1224 (1963); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L. Rev. 1018 (1962); Note, 71 Harv. L. Rev 513 (1958).

[15] See *New Orleans Pub. Belt R.R.* v. *Wallace*, 173 F.2d 145 (5th Cir. 1949); *Pearce* v. *Pennsylvania R.R.*, 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947); *cf. Oliver J. Olson & Co.* v. *Marine Terminals Corp.*, 215 F. Supp. 490, 492 (N.D. Cal. 1962); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 191 F. Supp. 288 (E.D. Pa. 1960); Note, 62 Colum. L. Rev. 1018, 1021 (1962).

[16] *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933); see, *e.g.*, *Landstrom* v. *Thorpe*, 189 F.2d 46, 51 (8th Cir.), *cert. denied*, 342 U.S. 819 (1951); *Kleinman* v. *Petty Dain Creations, Inc.*, 189 F.2d 546, 548 (2d Cir. 1951); *French Renovating Co.* v. *Ray Renovating Co.*, 170 F.2d 945, 947 (6th Cir. 1948). The Supreme Court employed the "substantially identical" language in a reapplication of the *Hurn* doctrine. *Armstrong Paint & Varnish* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938).

[17] *E.g.*, *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105-06 (1933); *Hannis Distilling Co.* v. *Mayor*, 216 U.S. 285, 288 (1910). See also *Binderup* v. *Pathe Exch. Inc.*, 263 U.S. 291, 306 (1923); *Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923); *Strachman* v. *Palmer*, 177 F. 2d 427, 432 (1st Cir. 1949) Magruder, J., concurring questions the "foreclosure by previous decision" aspect of the test.

[18] *E.g.*, *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601 (1st Cir. 1959); *Massachusetts Universelist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *Pure Oil Co.* v. *Puritan Oil Co.*, 127 F.2d 6 (2d Cir. 1942). See generally Comment, 46 Ill. L. Rev. 646 (1951).

[19] "Presentation of a substantial claim for purposes of the *Hurn* doctrine does not mean that it is valid on the merits. And the fact that it is subsequently found invalid on the merits does not affect the court's jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); Note, 49 Va. L. Rev 1224, 1228 n.9 (1963).

THE CONSPIRACY CLAIM

In addition to the independent claims against the defendants, Rumbaugh avers in his complaint that the railroad "did unlawfully join in the actions of the unions . . . and did conspire with the unions to obtain the discharge of the complainant and the damage to his property rights." Although no federal statute is cited which would authorize a district court to entertain such a common law action,[20] the doctrine of pendent jurisdiction is again appropriate for this purpose in the circumstances set up by the complaint.[21]

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[20] It does not appear that Rumbaugh in attempting to invoke the Civil Rights Act, 42 U.S.C.A. § 1985(3). *Cf. Walker v. Bank of America*, 268 F.2d 16 (9th Cir. 1959); *Schatte v. International Alliance*, 182 F. 2d 158 (9th Cir. 1950); *Lankford v. International Bhd. of Elec. Workers*, 196 F. Supp. 661 (N.D. Ala. 1960).

[21] *United Mine Workers v. Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959) (nonfederal conspiracy claim supported by federal secondary boycott claim); *Flame Coal Co. v. United Mine Workers*, 303 F.2d 39, 42 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); *United Mine Workers v. Osborne Mining Co.*, 279 F.2d 716, 724 (6th Cir.), *cert. denied*, 364 U.S. 831 (1960); *cf. Wertanen v. Wolverine Coal Co.*, 151 F. Supp. 440 (E.D. Mich. 1957).

CONCLUSION

For the above reasons we reverse the District Court's order dismissing the complaint without a hearing for lack of subject-matter jurisdiction. The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter. The nonfederal claims—wrongful discharge and conspiracy—may also be entertained under the doctrine of pendent jurisdiction. Accordingly, we remand the case for further proceedings consistent with this opinion.

Reversed and remanded

Judgment

Filed and Entered, March 2, 1964.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH,
Appellant,

vs.

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from *the United States District Court for the* Southern *District of* West Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Southern *District of* West Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

HERBERT S. BOREMAN
United States Circuit Judge

EDWARD S. NORTHROP
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA,
and UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

FILED
May 1, 1964

ON THE PETITIONS FOR REHEARING

PER CURIAM:

In their Petitions for Rehearing the appellees call attention to a factual inaccuracy in the opinion which, though legally insignificant, bears correction. According to the original complaint Rumbaugh approached an agent of the company on or about July 16, 1959, with an inquiry about his rights under the Railway Labor Act, not a "union

agent" as we recited initially. The misstatement has been corrected. That the union is the primary object of Rumbaugh's grievances appears convincingly in other portions of the complaint. The reasoning and result of our decision remain unaltered.

The core of appellees' petitions for rehearing is the Court's consideration sua sponte of the doctrine of pendent jurisdiction, which was not discussed in the briefs and oral arguments. Failure of the appellees to present this point before this time is no ground for a rehearing.

The fundamental question on the appeal is the propriety of the District Court's dismissal of the suit for lack of subject-matter jurisdiction. We concluded that there was original jurisdiction of the claim for breach of the duty of fair representation and, further, that there was ancillary jurisdiction of the remaining claims. This result is not inconsistent with the line of cases fostered by *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824), and discussed in *Hurn* v. *Oursler*, 289 U.S. 238 (1933). It goes without saying that a court has jurisdiction to determine its own jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 292 n.57 (1947); Wright, *Federal Courts* 44-47 (1963 ed.). Furthermore, the reasons assigned by the Railroad opposing application of the doctrine of pendent jurisdiction are all dealt with in the opinion and need no further elaboration. The additional cases cited in the petition of the union are either not in point, or cumulative, or distinguishable.

As to the union's contention that under West Virginia law there can be no cause of action for conspiracy against an unincorporated labor union, we need only say that this contention, if it has merit, may be raised as an affirmative defense on remand. It does not, however, undermine the ancillary federal jurisdiction which attaches to the non-federal claim. Other defenses which the union has as yet not asserted may also be raised in the District Court. Such

defenses as lack of venue, want of legal service and failure to state a claim upon which relief can be granted, which were not considered by the District Court, we, of course, decline to pass upon.

The Petitions for Rehearing are denied.

Filed May 1, 1964

No. 9022.

Order

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.

This Court having on March 2, 1964, rendered its decision reversing the judgment of the District Court appealed from in the above-entitled case, and the appellees having on April 1, 1964, filed petitions for rehearing en banc, and the petitions having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby denied.

May 1, 1964.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH, *Appellant*,

v.

WINIFREDE RAILROAD COMPANY, THE CARBON FUEL COMPANY, LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA, *Appellees*.

Petition of Appellees, Winifrede Railroad Company, A Corporation, and The Carbon Fuel Company, A Corporation, for A Rehearing.

Winifrede Railroad Company and The Carbon Fuel Company, two of the appellees in the above entitled cause, present this, their joint and several petition for a rehearing of this cause, and in support thereof, while reserving each position advanced in argument, respectfully represent:

At the outset your petitioners admit that some facets of the opinion of this Court are not clear to them. Petitioners, except where otherwise stated, proceed with the belief that the Court has answered the two basic jurisdictional questions posed on pages 2 and 3 of the Court's opinion as follows:

(a) There is federal court jurisdiction of Rumbaugh's claim against appellee Unions under 28 U.S.C.A. Secs. 1331, 1337, unless the District Court finds on the basis of evidence to be taken that Rumbaugh is a "supervisor," in which latter event there is not.

(b) Rumbaugh has stated no federal claim against Railroad (and presumably The Carbon Fuel Company, although Carbon is not mentioned in the Court's opinion), but under the judicially created doctrine of pendent jurisdiction the District Court has jurisdiction of the common law action for wrongful discharge asserted against Railroad and of the common law action for conspiracy alleged against Railroad and Unions, even though there is a "patent lack of diversity between the parties" (Opinion, pp. 16-19).

If these petitioners have correctly interpreted the Court's basic jurisdictional conclusions, the Court has patently erred in holding the doctrine of pendent jurisdiction applicable to Railroad. As the Court itself observes (Opinion, p. 17), the "judicially created" doctrine of pendent jurisdiction can be invoked only where the same plaintiff alleges a single cause of action constituting a substantial federal claim and a non-federal claim against "the same defendant." Since no federal claim is alleged by Rumbaugh against Railroad or Carbon, pendent jurisdiction cannot be invoked as to them.

2. The subject of "pendent jurisdiction" and the possible application of the doctrine to the common law claims asserted in Rumbaugh's complaint against Railroad and Carbon was not briefed or argued by any party to this action. For it to be applied as proposed in the Court's opinion would extend the jurisdiction of inferior federal courts to an incalculable degree. Quite aside from the merits of whether a railway employee should enjoy the privilege of "forum shopping" between the Adjustment Board, State courts and U. S. District Courts, irrespective

of diversity of citizenship, where has Congress conferred such jurisdiction on the District Courts? The Judicial Code of 1948, 28 U.S.C.A., Sec. 1338(b) legitimized the rule of *Hurn* v. *Oursler*, 289 U.S. 238, but only in the area of law (copyrights, patents, trademarks, and unfair competition) which was the subject of that decision.

The result of the application of the pendent jurisdiction doctrine in this cause could well have results in this litigation which the Court may not have considered, and which further demonstrates the inapplicability of the doctrine in this cause.

Under the law of West Virginia, Rumbaugh has no litigable right of action against any of the Union appellees. *Milam* v. *Settle*, 127 W. Va. 271, 32 S.E. 2d 269 (1944). The District Court would be bound by the rule of *Milam* v. *Settle* insofar as Rumbaugh's common law claims against Unions are concerned. *Angel* v. *Bullington*, 330 U.S. 183 (1947) reversing 150 F. 2d 679 (4th Cir.).

Thus, to apply the doctrine of pendent jurisdiction in this case will result in the District Court having jurisdiction of a purely common law action against Railroad, without diversity and without the complaint asserting a federal claim against Railroad, but the District Court will not have jurisdiction of the common law claims against Unions, the appellees against whom the Court says the complaint asserts a federal claim which in turn permits the doctrine of pendent jurisdiction to be invoked!

It cannot properly be said that the complaint asserts both a federal and a state claim against the Union appellees, or against either of these appellees. Yet it must assert one "cause of action" constituting a federal claim against each defendant as well as a state claim against each defendant for the doctrine to be applicable.

There are additional reasons why the doctrine of pendent jurisdiction cannot properly be invoked in this cause.

It cannot properly be said that the complaint of Rumbaugh presents only a "single cause of action" under the test of *Hurn* v. *Oursler*, supra and *Armstrong Paint & Varnish* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938). Note, 71 Harv. L. Rev. 513 (1958). The claim against Unions here is for alleged breach of a duty of fair representation imposed by the Railway Labor Act. Rumbaugh claims that he was a non-supervisor, that Unions refused to admit him to membership, that Unions asked Railroad to discharge him, and that Unions refused to represent him after he was discharged. The claim against Railroad, on the other hand, is "essentially one at common law for breach of contract and does not arise under the Railway Labor Act." (Opinion, p. 17). Rumbaugh must only establish what the contract of employment was and that Railroad breached the contract in discharging him. It is obvious, we submit, that the facts necessary to prove Rumbaugh's claims against Unions under the Railway Labor Act will not be the same facts necessary to establish his claim against Railroad for breach of contract.

". . . if A has a cause of action against X, and there is a federal basis to support the claim, and he joins with it a cause of action against Y, and there is no federal basis for the latter claim, then it must be dismissed in the absence of diversity or alienage." Moore's Federal Practice, 2nd Edition, Vol. 3, p. 1818, and cases cited pp. 1818 and 178.

Barron and Holtzoff in Federal Practice and Procedure, Rules Edition, Vol. 1, Sec. 23, p. 100, recognize that the test propounded in *Hurn* v. *Oursler*, supra, with "its emphasis on factual identity of varying grounds for recovery," suffers from "indefiniteness" which has "created difficulties for the lower courts."

3. In addition to erroneously invoking the doctrine of "pendent jurisdiction," which was not briefed or argued by any party, and concerning which petitioners urge that

they be permitted to be heard, the Court's opinion contains other errors, some of a factual and some of a legal nature.

In summarizing the allegations of the complaint, the opinion of the Court contains a misstatement of fact on page 4. After stating, correctly, that:

"From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague."

The Court erroneously continues.

". . . the plaintiff was moved to inquire of a union agent about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was 'briskly informed' by the agent that no such right existed and displeased as well with changes being effected in rates of pay and work rules, Rumbaugh . . ."

The actual language of the complaint (Rumbaugh's original Brief and Appendix, pp. 28, 29) demonstrates the Court's error.

"5. Complainant worked in the shop with several other mechanics and on July 16, 1959 when a mechanic was off sick, another mechanic, Cooper, was next in line on seniority. Before he could take the job the defendant, Railroad and Carbon Fuel Company through its joint officer Ingra_m, did instruct one Calvert, Secretary and Treasurer of the local union to take the vacant job even though Calvert was not a mechanic, and Calvert did receive extra compensation over and above that which he had previously received. Complainant inquired of Ingrahm and Morton[1] immedi-

[1] Ingrahm and Morton were representatives of Railroad management. See last sentence, paragraph 5, Rumbaugh Complaint, page 29 of Rumbaugh's Brief and Appendix.

ately thereafter, as to the applicable rules for the operation of the shop under the Railway Labor Act and the rights of the complainant and other employees therein to organize under the Railway Labor Act; complainant was briskly informed by the officers of the railroad and Carbon above mentioned that he had no rights under the Railway Labor Act and that he should do as told by Mr. Ingrahm. At the same time rates of pay, rules and working conditions were being changed by the defendants contrary to the Railway Labor Act. Complainant went to Thomas, President of the Railroad and was assured of an investigation and hearing but the same was never given to him, all contrary to law. . . ."

The Court's error, though obviously inadvertent, lends color to the picture painted by the Court's opinion of a Rumbaugh-Union dispute, in which Railroad was only "incidentally" involved as in *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir., 1959); rather than a Rumbaugh-Railroad dispute over which the Adjustment Board would have exclusive primary jurisdiction, 45 U.S.C.A. 153, First (i).

In summarizing the complaint, the Court omitted to note that Rumbaugh expressly elected to abandon any claim he had for reemployment (Rumbaugh Brief & Appendix, p. 30). We will discuss the materiality of this omission when we discuss *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir., 1959) and such cases as *Steele*, *Howard* and *Graham*, upon which the Court relies in holding the District Court had jurisdiction of a "federal" claim against Unions and that Railroad could not complain because of its joinder as a party defendant.

4. The Court erred (Opinion, pp. 8, 9) in characterizing the case of *Priest* v. *Chicago, R.I. & P. R.R.*, 189 F. 2d 813 (8 Cir., 1951) as "a case strikingly similar to the one at hand," and in relying on it as authority for its erroneous

conclusion that evidence should be taken before ruling on the question of jurisdiction.

There was *diversity* in *Priest* and solely for that reason the Circuit Court held that the District Court erred in dismissing the complaint for lack of jurisdiction on the ground that the Adjustment Board had exclusive jurisdiction. Plaintiff contended in *Priest* that his complaint stated a common law claim for wrongful discharge and diversity jurisdiction and the Eighth Circuit agreed that his complaint was susceptible to such an interpretation.

5. We respectfully submit that the Court misinterprets Section 153 First (i) of 45 U.S.C.A. (the Railway Labor Act) and the rationale of *Steele*, *Howard*, *Graham* and other cases cited, in holding that since Rumbaugh had a *joint* dispute with Railroad and Unions involving only the interpretation of a collective bargaining agreement, the Railway Adjustment Board did not have jurisdiction. The cases cited do not support this conclusion. If the Railroad is only a bystander, not actually involved in the dispute, or the proper interpretation and application of the collective bargaining agreement is not material in disposing of the dispute, *Steele*, *Howard*, *Graham*, *Conley* v. *Gibson*, *Cunningham* v. *Erie R.R.*, and the other cases cited might have relevancy. But where the sole issue involves the proper interpretation and application of a collective bargaining agreement, and the dispute is with Railroad and Unions about this single issue, and determination of the dispute with Railroad will determine the dispute with the Unions, the exclusive jurisdiction of the Board is not controverted by the rationale of any of the cases cited.

We reiterate our belief that this Court held that as to appellee Railroad, Rumbaugh's complaint stated no federal claim, or put another way, the Court held that the Adjustment Board had exclusive primary jurisdiction of Rumbaugh's dispute with Railroad about whether or not he was a supervisor and thus excluded from the collective

bargaining agreement. Such a conclusion seems inescapable from the language of the Court's opinion.

6. Appellees are perplexed by that part of the Court's opinion (pp. 12-14) relating to joinder of Railroad in Rumbaugh's federal claim against Unions. We do not believe the Court holds there is a federal claim against Railroad, as we have heretofore stated. The Court speaks in terms of federal jurisdiction (of the claim against Unions) not being "destroyed" by joinder of railroads in *Steele, Howard* and *Graham*, and erroneously cites *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2nd Cir., 1959) as authority for joining Railroad.

Steele, Howard and *Graham* involved the validity of collective bargaining agreements, not their interpretation. *Brotherhood of R. T.* v. *Howard*, 343 U.S. 768, 774, summarizes the scope of those cases:

> "Here, as in the Steele Case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum v. Delaware, L. & W.R. Co. 339 US 239, 94 L ed 795, 70 S Ct 577. *This dispute involved the validity of the contract,* not its *meaning*. Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in Switchmen's Union of N. A. v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S Ct 95. . . ." (Emphasis added)

Jurisdiction of defendant railroads in *Steele, Howard* and *Graham* existed, if at all as ancillary equity jurisdic-

tion to prevent obliteration of employee's rights, on the theory that the employee had no administrative remedy. Here the Adjustment Board clearly had jurisdiction of Rumbaugh's dispute with Railroad and interpretation of the agreement by the Board would have resolved, incidentally, the dispute with the Unions.

Cunningham v. *Erie R.R.*, 266 F. 2d 411, was erroneously relied on (Opinion, pp. 12, 13) to support Rumbaugh's joinder of Railroad in his "federal claim" against Unions. The *Cunningham* case is not in point, because as Judge Medina there observed (266 F. 2d 415):

> "This dispute based on alleged discrimination is between the employee and the union not between either an employee or a union and the railroad; the railroad is brought in only because it claimed it was required by law to discharge persons who had been removed as members of the union for non-payment of dues."

And at page 416:

> ". . . what Cunningham is doing in this action is questioning the *validity* of the collective bargaining agreement as applied to the circumstances of his dismissal, rather than the '*interpretation or application*' of the agreement." (Emphasis by the Court)

Further, in *Cunningham* Judge Medina apparently thought it important to buttress his decision that there was jurisdiction of railroad by saying (266 F. 2d 416):

> "While the complaint prays for relief by way of damages and does not in terms ask for Cunningham's reinstatement by the railroad, his claim was treated at the trial as one in the alternative for reinstatement and there was considerable discussion of the point on the oral argument before us, without objection. Moreover, the railroad has asserted in its amended answer a claim for indemnity against the union . . ."

In the later case of *Latham* v. *Baltimore & Ohio Railroad Company*, 274 F. 2d 507, 511, 512, Judge Medina described *Cunningham* as a case in which exclusive jurisdiction had not been conferred on the Adjustment Board because Cunningham was questioning the "*validity*" of the collective bargaining agreement, not its "*interpretation*" (p. 511). At page 512 of *Latham*, Judge Medina said of *Cunningham*: "The railroad was made a party because Cunningham prayed for reinstatement."

There is no similarity between Railroad's position in this case and the position of the Erie in *Cunningham*:

(1) There the validity of the contract was in dispute. Here the dispute is about interpretation and application of the contract.

(2) There the dispute was between the employee and his union and not between the employee and the railroad. Here the dispute is between the employee and the union *and* between the employee and the railroad, and both disputes relate to the proper interpretation and application of the contract.

(3) There Cunningham sought reinstatement in employment. Here Rumbaugh has expressly renounced any claim to reinstatement in employment.

7. If, as your petitioners contend, the Federal District Court lacked jurisdiction of Rumbaugh's claim against Railroad and Carbon, Rule 20(a) of the Federal Rules of Civil Procedure has no application because it is basic, reaffirmed in Rule 82, that the Rules of Civil Procedure cannot extend the Court's jurisdiction.

8. The Court acknowledges that the action of the District Court in dismissing this action against all defendants for lack of jurisdiction was "consistent with the position theretofore taken by this Court," but says "it does not reflect the broader principle which we subsequently announced in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F. 2d 191 (4th Cir. 1963)". Opinion, pp. 5, 6. We respectfully submit that *Thompson*, which involved only an employee-union controversy which in turn involved "only incidentally a consideration of the collective bargaining agreements and Thompson's seniority rights" (316 F. 2d 191, 199), is not determinative of this case. *Thompson* actually left most of the legal principles announced by Judges Parker, Soper and Dobie in *Alabaugh* v. *Baltimore and Ohio Railroad Company*, less than nine years ago, 222 F. 2d 861 (1955), unimpaired and determinative of this case unless *Alabaugh* is to be completely overruled. We respectfully submit that decisions of this Circuit should not be overruled except by action of the court in banc, particularly when, as in the situation here, no subsequent decision of the U. S. Supreme Court since *Alabaugh* requires reversal. This is the practice in at least one other circuit. See *Upton* v. *C. I. R.* 283 F. 2d 716, 723 (9th Cir. 1960).

The decision of this court in Rumbaugh can only bring about the result anticipated by Judge Parker, when he said (222 F. 2d 861, 866):

> "* * * it would breed endless confusion and virtually nullify the administrative remedy which Congress has been at pains to provide, to allow the Board to be by-passed by an allegation that rights under a statute are involved."

9. Because of the errors assigned and the importance of the issues presented in this case, and particularly since the applicability of the doctrine of pendent jurisdiction was not briefed or argued by any party in this cause, a re-

hearing of this case on its merits before the Court in banc is requested.

Respectfully submitted,

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Counsel

March 26, 1964

I hereby certify that the foregoing petition is, in my opinion, well founded and that it is presented in good faith and not for delay.

F. PAUL CHAMBERS
Of Counsel for
WINIFREDE RAILROAD COMPANY and
THE CARBON FUEL COMPANY,
Appellees.

APPENDIX E

RAILWAY LABOR ACT

45 USCA

"§151. DEFINITIONS

"When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this chapter.

"Third. The term 'Mediation Board' means the National Mediation Board created by this chapter.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation desig

nated either by a carrier or group of carriers or by its or their employees, to act for it or them.

"Seventh. The term 'district court' includes the United States District Court for the District of Columbia; and the term 'court of appeals' includes the United States Court of Appeals for the District of Columbia.

"This chapter may be cited as the 'Railway Labor Act.' May 20, 1926, c. 347, § 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, § 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921; Aug. 13, 1940, c. 664, §§ 2, 3, 54 Stat. 785, 786; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107."

"§151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."

"§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere

in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly desig

nated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

Union security agreements; check-off.

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of

the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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Supreme Court of the United States

OCTOBER TERM, 1964

~~No. 283~~

No. ----

LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA,

Petitioners,

v.

LUTHER RAY RUMBAUGH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Charleston, West Virginia

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ....

LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA,

Petitioners,

v.

LUTHER RAY RUMBAUGH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Local Union 14182 United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America,[1] and each of them, pray that a writ of certiorari issue to review (1) the judgment of the United States Court of Appeals for the Fourth Circuit[2] entered March 2, 1964, in Case No. 9022, styled *Luther Ray*

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[1]Local Union 14182 United Mine Workers of America is herein called "Local", District 50 United Mine Workers of America is called "District 50" and United Mine Workers of America is called "UMW". Collectively they are called "Unions".

[2]Herein called "Fourth Circuit".

Rumbaugh, Appellant[3] v. *Winifrede Railroad Company, a corporation, The Carbon Fuel Company, a corporation,*[4] *Local Union 14182 United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America, Appellees,* wherein the Fourth Circuit reversed with costs the judgment of the United States District Court for the Southern District of West Virginia (at Charleston)[4a] entered April 15, 1963, that "there is no diversity of citizenship" and this "Court is without jurisdiction over the subject matter of this action", and dismissed the action and complaint, with costs (A. 6a-7a)[5] and (2) the Fourth Circuit's order entered May 1, 1964 which denied Unions' petition for rehearing (R. 92; A. 27a).[6]

A certified appendix record in said case, together with the proceedings in the Fourth Circuit, is furnished herewith in accordance with this Court's Rules.

OPINIONS BELOW

The Fourth Circuit's opinion of March 2, 1964, *as corrected by its Per Curiam opinion upon petitions for rehearing,* appears in Appendix B hereto (pages 8a-23a), in the certified record (R. 24-43), and is reported in 331 F. 2d 530 (Adv. Op. June 20, 1964).

The Fourth Circuit's Per Curiam opinion of May 1, 1964, denying Petitioners' Petition for Rehearing appears in Appendix C hereto (pages 25a-27a), in the certified record (R. 88-90), and is reported in 331 F. 2d 540 (Adv. Op. June 20, 1964).

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[3]Herein called "Rumbaugh".

[4]Herein called "Railroad" and "Carbon Fuel". Jointly they are called "Companies".

[4a]Called "district court".

[5]The abbreviation "A. ____" refers to the Appendices to this Petition.

[6]References to the certified appendix record are indicated herein by the abbreviation "R. ____". Where it is necessary that specific references be made to the several appendices filed in the Fourth Circuit, then "P.A." indicates the Appendix filed in that Court by Rumbaugh, "U.A." indicates the Appendix filed therein by Unions, and "E.A." indicates the Appendix filed therein by Railroad and Carbon Fuel, all of which are to be found in the certified appendix record.

JURISDICTION

The Fourth Circuit's judgment reversing the district court was entered March 2, 1964. Unions' Petition for Rehearing (R. 62-86) was denied *en banc* by the Fourth Circuit's order entered May 1, 1964 (R. 92). This Court's jurisdiction is invoked under 28 USC, Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Rumbaugh's complaint asserted district court jurisdiction to be based on "The Railway Labor Act (45 USC sec 151 et seq) and 28 USC sec 1331, & 1337, and Taft Hartley Act (29 USC sec 141-168) and 29 USC 101-115, and Interstate Commerce Act 49 USC sec 1 et seq." (A. 48a).

QUESTIONS PRESENTED

1. Where a discharged employee sues his employer, a carrier subject to the Railway Labor Act, its parent company, and labor unions, seeking damages for an alleged wrongful discharge and conspiracy, and the complaint alleges that the unions have an existing labor agreement with the employer-carrier covering non-supervisory employees only, that a dispute originated between the carrier and the discharged employee concerning his employment status whether he was a supervisory or non-supervisory employee, and the discharged employee's claim is that unions violated their federal duty of fair representation to him which depends upon whether he was within the bargaining unit as a non-supervisory employee, does the National Railroad Adjustment Board have exclusive jurisdiction and competence to determine the issue under Section 3 of the Railway Labor Act [45 USCA, Section 153, First (i)], or is a federal district court vested with exclusive jurisdiction under 28 USCA 1331 and 1337 to make such determination?

2. In the absence of diversity of citizenship, do the allegations of the complaint suffice to charge the collective

bargaining agent with a violation of a federal duty of fair representation of the discharged employee so as to warrant federal district court jurisdiction in the absence of an allegation that such employee status in the bargaining unit provided for in the collective agreement has been established by the National Railroad Adjustment Board pursuant to Section 3 of the Railway Labor Act [45 USCA, Section 153 First (i)]?

3. Even if the complaint alleges a violation of a federal duty of fair representation, (a) does a federal district court have pendent jurisdiction over a nonfederal, state common-law tort action brought against unincorporated unions for damages based upon an alleged conspiracy where state courts in the state in which the alleged tort occurred and in which the district court is sitting are barred, under state public policy, from entertaining jurisdiction of the subject matter of such suit and would not permit such unions to be sued or a money judgment to be entered against them; and (b) does the doctrine of federal preemption foreclose the applicability of pendent jurisdiction?

STATUTES INVOLVED

The statutory provisions involved are pertinent sections of the Railway Labor Act (45 USCA, Sections 151, 151a, 152 and 153); and West Virginia Code, 1931, as amended, Chapter 2, Article 1, Section 1. Also involved are provisions of West Virginia Constitution, Article VIII, Section 21.

These constitutional and statutory sections are to be found in Appendix F to this Petition (A. 55a).

STATEMENT OF THE CASE

1. KIND OF ACTION

Rumbaugh seeks $150,000 compensatory damages and $150,000 punitive damages from Unions, Railroad and Carbon Fuel, jointly and severally, upon charges that Unions

and Carbon, as joint tortfeasors, unlawfully destroyed and "in a discriminatory manner by unlawful means" secured his discharge by Railroad, "acting maliciously and in bad faith toward" him "with intent of destroying his employment" and all property and seniority rights pertaining thereto. Rumbaugh charges further that Unions, Railroad and Carbon colluded and conspired to secure his discharge, and that Unions refused him membership and refused to represent him.

2. ALLEGATIONS OF THE COMPLAINT

According to the complaint's allegations (A. 48a-54a):

Carbon Fuel produces coal in Kanawha County, West Virginia. It owns Railroad, a common carrier subject to the Interstate Commerce Act (A. 48a-49a), which transports coal, among other commodities, produced by Carbon Fuel to the "C & O interchange and the Winifrede Dock; both at Winifrede Junction, in Kanawha County, West Virginia" (R. III, U.A. 1a).

Rumbaugh, a Railroad employee, was discharged October 15, 1959. From 1928 until 1930 Rumbaugh's work for Railroad was that of a laborer. Continuously thereafter until discharged, Railroad treated Rumbaugh "as a railroad employee" in that "deductions were made for the Railroad Retirement from" his salary.

On October 20, 1958, Railroad's employees selected District 50 as their bargaining representative. District 50, "on behalf of Local", and Railroad on November 7, 1958, entered into a collective bargaining agreement (R. III, U.A. 1a) which provides, *inter alia*, that Railroad, in its operation, "*employs non-supervisory men who are members of and who are represented herein by the Union*" (R. III, U.A. 1a).[7]

While Rumbaugh alleges he was an hourly paid employee with no authority to hire, fire or discipline (A. 49a-50a) and

[7] All emphases are supplied, unless otherwise indicated. The bargaining agreement mentioned in and attached to the complaint, is found in the certified appendix record (R. III, U.A. 1a-4a).

kept records of other employees of a clerical nature with no supervisory function over them, he admits he was "given a title as foreman by the company for the purpose of signing locomotive inspection reports" (A. 50a); and that when discharged on October 15, 1959, he worked in the shop with several other mechanics as "the senior mechanic repairing, servicing and inspecting locomotives" (A. 49a).

On July 16, 1959, a mechanic was off sick (A. 50a). Another mechanic (*not* Rumbaugh) was next in seniority, but *Railroad and Carbon's* joint officer Ingrahm instructed Local's secretary-treasurer, who was not a mechanic, to take the vacant job. Rumbaugh then inquired of Ingrahm and one Morton (whose capacity or relationship to Railroad and Carbon is not alleged) as to "applicable rules for the operation of the shop under the Railway Labor Act" and rights of Rumbaugh and other employees to organize under the Act and was briskly informed" by *Railroad and Carbon* that Rumbaugh "had no rights" thereunder. When Rumbaugh complained to Railroad's president, Rumbaugh was "assured of an investigation but the same was never given to him, all contrary to law" (A. 50a-51a).

Thereafter, on October 14, 1959, Rumbaugh inquired of "Hunter the agent and representative of the defendant unions as to his rights" under the Act and "if the contract, rules and working conditions had been filed with the National Mediation Board or elsewhere as required under" the Act; Hunter went to management and "filed charges" against Rumbaugh "on the false ground that he was discriminating against the union, and Hunter, Ingrahm and Morton collusively conspired then and there" that Rumbaugh should be discharged. The next day (October 15, 1959) Rumbaugh was discharged by Ingrahm without reason (A. 51a).

According to Rumbaugh's allegations, he was discharged prior to settlement of his dispute "*contrary to the agreements*" *between Railroad and Unions* and on July 6, 1960, Railroad advised him "he had no rights under the agreements as he was a *supervisory employee*" (A. 52a); that

"there has been no legal determination" he is "a supervisor" but "unions have consistently refused membership" to him "though he has frequently requested membership and this the unions have done in an arbitrary and discriminatory fashion with bad faith", permitting others to join though designated as shop foreman (A. 50a).

Rumbaugh charges (A. 52a) Unions' action to be "indicated by the following:

"a. Did refuse to permit him to join the union and did actively with malicious intent seek to destroy his employment all contrary to the acts of Congress set forth.

"b. Once on the property the unions did unlawfully refuse to represent the complainant contrary to to federal law.

"c. Did file false, malicious and discriminatory charges against him and with the management.

"d. Did act unlawfully without required certification under Taft Hartley Act and Railway Labor Act.

"e. Did contrary to federal law interfere with complainant's right to bargain collectively with his employer under the Railway Labor Act, and the Taft Hartley Act."

Rumbaugh alleges Carbon unlawfully joined in the alleged union actions and conspired with Unions to obtain his discharge (A. 53a).

Rumbaugh, summarizing Railroad's discrimatory and unlawful action, alleges Railroad "Did unlawfully consider complainant *as a supervisory employee* as a pretense to deny him the rights of collective bargaining guaranteed to him by federal law cited in paragraph 1" (A. 53a).[6]

[6]In addition, Rumbaugh summarizes Railroad's unlawful action to be "indicated" by the following:

"a. Did favor union officials with choice assignments contrary to law and discharged complainant when the violations of law were called to company's attention.

"b. Did manipulate and control the union so that the same was used to the detriment of employees and in a discriminatory fashion.

"c. Did set up rates of pay, hours and working conditions contrary to acts of Congress known as Railway Labor Act and Adamson Act."

3. UNIONS' MOTIONS TO DISMISS

In separate Motions To Dismiss, To Quash Summons and Service Thereof and Return of Service Thereon,[9] Unions asserted the district court to be without jurisdiction of the action's subject matter and that requisite diversity of citizenship between Rumbaugh and Unions is lacking.

4. THE DISTRICT COURT'S OPINION AND JUDGMENT

Noting Unions moved for dismissal on several grounds, the district court regarded it "necessary to consider only the question of this Court's jurisdiction over the subject matter of this action" (A. 1a). The district court's opinion (213 F. Supp. 620) observed the action is not "based on diversity of citizenship", that there is no allegation thereof, and that on the complaint's face "it is clearly evident that the requisites for such jurisdiction are lacking" (A. 1a).

Characterizing the complaint as "prolix and ambiguous",[10] the district court opined that it "goes far afield from a mere complaint of alleged discriminatory treatment of" Rumbaugh "by the Union representative in exercising its authority by virtue of the Act" since "It alleges that the defendant corporations actively conspired with the Union to bring about plaintiff's discharge" (A. 5a). "A distillation" of the complaint's allegations, declared the district court, "indicates that they are nothing more than a com-

[9]The appeal record filed in the Fourth Circuit included the three motions: Local's Motion is found at page 21 thereof; UMW's Motion at page 26 and District 50's Motion at page 31.

For brevity and to comply with the Fourth Circuit's printing Rule, Unions printed only District 50's Motion which is to be found in the certified appendix record filed with this Court's Clerk (see R. III, U.A. 5-7a).

The grounds therein are identical to those assigned in UMW's Motion. Likewise, the separate Motions of District 50 and Local are identical as to grounds, except Ground No. 5 in District 50's Motion is omitted in Local's Motion.

[10]As a ground for dismissal, Unions asserted the complaint violated Rule 8(a)(1), Federal Rules of Civil Procedure, in failing to state a short and plain statement of the grounds upon which the Court's jurisdiction depends, and Rule 8(a)(2) of the Rules in failing to state a short and plain statement of plaintiff's claim (R. III, U.A. 6a-7a). The district court did not pass upon this ground.

plaint for an unlawful'' employment discharge ''or a conspiracy upon the part of the defendants to commit a common law tort against'' Rumbaugh, jurisdiction of which cannot be entertained by the district court (A. 5a).

5. THE FOURTH CIRCUIT'S ORIGINAL OPINION

a. The Issue of District Court Jurisdiction

Upon appeal, Rumbaugh complained Unions violated a duty of ''fair representation'' owed him as an employee of Railroad, thus warranting federal jurisdiction of the complaint's subject matter.

In the Fourth Circuit, as in the district court, Unions challenged district court jurisdiction of the subject matter contending, *inter alia,* (1) that the district court had properly held the complaint alleged a common law tort and that diversity of citizenship was lacking; and (2) that the complaint failed to charge a duty owing by Unions as a collective bargaining agent to Rumbaugh.

Unions contended further that federal cases establishing a union's duty of fair representation make clear that *such duty is owing only to those employees within the bargaining unit for whom the union has contractually undertaken to act,* that Rumbaugh fallaciously assumed to be within the collective agreement's bargaining unit whereas Rumbaugh's allegations themselves posed the basic dispute whether Rumbaugh was a supervisory or non-supervisory employee, and that *such employment-status dispute initiated with Railroad and Carbon—not with Unions—by reason whereof the dispute, involving, as it did, the interpretation and application of the collective bargaining agreement,* lay within the exclusive competence of the National Railroad Adjustment Board which, under Section 3 of the Railway Labor Act (45 USCA 153, First (i)) is vested with exclusive jurisdiction over ''disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of

agreements concerning rates of pay, rules, or working conditions . . ." [45 USCA 153, First (i)].

Disagreeing, the Fourth Circuit held the "Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment" (A. 17a), that the Adjustment Board was not "the proper forum for this case" (A. 20a), that "The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter" (A. 23a). Countering Rumbaugh's position that his status in the bargaining unit is immaterial (A. 13a), the Fourth Circuit conceded Union's position that the duty of fair representation is owed only to employees within the bargaining unit (A. 12a), admitted "an employee must establish, as part of his case, that he is a member of the designated bargaining unit" (A. 12a) and directed the district court, if upon examining the facts, it should find Rumbaugh not a supervisor, then the action for invidious discrimination should be heard on the merits, but should the finding be he was a supervisor, then a dismissal motion could then properly be entertained (A. 20a).

b. The Issue of Pendent Jurisdiction Over the Non-federal Common-law Claim of Conspiracy.

The Fourth Circuit agreed with the district court there was no diversity of citizenship between Rumbaugh and the parties sued. It held, however, "the doctrine of pendent jurisdiction" to be appropriate "in the circumstances" of the complaint to confer district court jurisdiction to determine Rumbaugh's charges of conspiracy (A. 23a).

6. UNIONS' PETITION FOR REHEARING EN BANC IS DENIED IN A PER CURIAM OPINION

The Fourth Circuit's original opinion was by a three-judge panel.[1] Unions filed a Petition for Rehearing, pray-

[1] The panel consisted of Chief Judge Sobeloff, who wrote the opinion, and Circuit Judge Boreman and District Judge Northrop.

ing for rehearing argument before the Court *en banc* (A. 28a-47a). In a Per Curiam opinion, rehearing was denied (A. 25a-27a).[12]

In their rehearing petition, Unions stressed that the Fourth Circuit had, in its original opinion, varied the factual recitals found in the complaint and such variance had led the Court into error of law.

To achieve its erroneous result the Fourth Circuit opinion recited Rumbaugh was "briskly informed" *by the union agent* he had no right to organize other employees, whereas this was totally inconsonant with the complaint which averred "complainant was briskly informed *by the officers of the railroad and Carbon* . . he had no rights under the Railway Labor Act" (A. 50a-51a), that he was assured by Railroad's president of an investigation, and only thereafter "Complainant inquired of Hunter the agent and representative of the defendant unions as to his rights under the Railway Labor Act" (A. 51a). The Fourth Circuit corrected this factual misstatement in its Per Curiam opinion; and although the pertinency of the correction lies in the unquestionable factual allegations that the employment-status dispute originated between Rumbaugh and the employer Railroad, the Fourth Circuit appraised its misstatement as "legally insignificant" (A. 25a).

But the Fourth Circuit continued to ignore decisive allegations in the complaint, despite Unions' emphasis in the rehearing petition upon their omission. Whereas its original opinion was careful to point to Rumbaugh's allegations described as establishing his "non-supervisory status", (A. 14a) it was equally assiduous *to ignore and to avoid* pointing out vital allegations in the complaint that it was Railroad and Carbon which avowed Rumbaugh had no rights under the Railway Labor Act and that he was a supervisory employee. The Per Curiam opinion continued to ignore

[12] Denial of rehearing was by the Fourth Circuit *en banc* (A. 27a). A petition for rehearing also filed by Railroad and Carbon Fuel was likewise denied (A. 27a).

these material allegations. Significantly, the Per Curiam opinion is silent as to Unions' complaint that "*the opinion recitals are not those of the complaint*" (A. 32a) and to Unions' argument that the omitted and ignored allegations show that the situation alleged in the complaint is precisely geared to the jurisdiction which Congress vested exclusively in the National Railroad Adjustment Board.

The Fourth Circuit's Per Curiam statement (A. 26a) "That the union is the primary object of Rumbaugh's grievances appears convincingly in other portions of the complaint" obviously emanates from its willingness wittingly to ignore, omit and not consider the decisive allegations discussed. Both reflect the Fourth Circuit's misconception and erroneous interpretation of the complaint's allegations. Both explicate the Fourth Circuit's erroneous conclusion that the district court—not the Railroad Adjustment Board—has jurisdiction to determine if Rumbaugh is an employee within the bargaining unit which the Fourth Circuit itself recognizes to be the preliminary issue to a determination of Unions' responsibility and liability.

Unions' Petition for Rehearing pointed out *the issue of pendent jurisdiction had not been raised or discussed or argued in either* the district court or in the Fourth Circuit (A. 41a). In the rehearing petition (A. 38a) Unions urged that West Virginia's public policy renders it impermissible either to bring an action against an unincorporated labor organization or to enter any judgment against them. Though the rehearing petition was Union's first opportunity to discuss this issue, the Fourth Circuit's Per Curiam opinion states "Failure of the appellees to present this point before this time is no ground for a rehearing" (A. 26a). And, although the real concern in the case was whether there was *district court jurisdiction* of the subject matter, the Fourth Circuit declared that "a court has jurisdiction to determine its own jurisdiction" (A. 26a)—an opportunity the Fourth Circuit never afforded the district court as to the pendent jurisdiction issue.

While the Fourth Circuit's Per Curiam opinion provided (A. 26a), that Unions' contention that under West Virginia law there could be no cause of action against Unions, such contention "may be raised as an affirmative defense on remand", it held nonetheless that "It does not, however, undermine the ancillary federal jurisdiction which attaches to the nonfederal claim" (A. 26a).[9]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE IMPORTANT IN THE ADMINISTRATION OF THE RAILWAY LABOR ACT'S SECTION 3 [45 USCA, SECTION 153 FIRST (i)], NAMELY, WHETHER, IN AN ACTION FOR DAMAGES BY A DISCHARGED EMPLOYEE AGAINST A RAILROAD EMPLOYER AND A BARGAINING AGENT, A FEDERAL DISTRICT COURT, TO THE EXCLUSION OF THE NATIONAL RAILWAY ADJUSTMENT BOARD, HAS JURISDICTION TO INTERPRET AND APPLY THE TERMS OF A COLLECTIVE AGREEMENT TO DETERMINE IF A DISCHARGED EMPLOYEE IS WITHIN THAT AGREEMENT'S BARGAINING UNIT, SO AS TO IMPOSE UPON THE BARGAINING AGENT THE FEDERAL DUTY OF FAIR REPRESENTATION.

Heretofore decisions which raised important questions in the administration and interpretations of the Railway Labor Act have merited the grant of certiorari. *Pennsylvania Rr. Co.* v. *Day*, 360 U. S. 548 (1959); *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601 (1959); *Conley v. Gibson*, 355 U. S. 41, 44 (1957); *BRT* v. *Chicago River Co.*, 353 U. S. 30 (1957).

A. The Fourth Circuit's Holding that a Federal District Court, Not the National Railroad Adjustment Board, Has Exclusive Jurisdiction to Interpret and Apply the Provision of a Collective Bargaining Agreement As to Whether a Discharged Employee Is Within a Bargaining Unit Is Challenged by Prior Decisions of This Court.

The Fourth Circuit concedes that "resolution of the issue whether or not Rumbaugh is a supervisor may require an interpretation of the collective bargaining agreement" (A. 19a). Its mandate to the district court is to determine if Rumbaugh is a supervisory employee and "therefore not within the unit represented by the union", in which event

[9] The Per Curiam opinion also provided that other defenses may also be raised in the district court (A. 26a).

its directive to the lower court is "a motion to dismiss could then properly be entertained" (A. 20a). These mandates to the district court to determine if it has jurisdiction are alien to and in conflict with this Court's reasoning in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946) when it declared, "*Only after the Adjustment Board acts, but not until then*, can it plainly appear that" court jurisdiction is available. Accord: *Slocum* v. *Delaware, etc. Rr. Co.*, 339 U. S. 239 (1950).

The Fourth Circuit's effort to dissipate *Slocum's* applicability to the instant case by referring to a footnote therein (A. 16a-17a, fn. 7) to the effect that *Slocum's* concern did not involve disagreement or conflict between an employee and his bargaining agent must be appraised in light of the Fourth Circuit's erroneously restricting Rumbaugh's disputed employment status to Unions rather than adhering to the complaint's allegations which show such dispute originated with and involved the employer (Railroad), for as the Fourth Circuit admits (A. 16a), the "plain meaning" of 45 USCA 153, First (i) "is that the *Board* is charged with responsibility of adjudicating controversies between employees and their employer" growing out of the interpretation and application of existing agreements.

The Fourth Circuit's jurisdictional argument that interpretation of collective agreements "has not in the past prevented courts from retaining jurisdiction of actions to enforce the duty of fair representation" (A. 19a, fn. 10) relies upon *Conley* v. *Gibson*, 355 U. S. 41, 44-45 (1957) and *Thompson* v. *Bro. of Sleeping Car Porters*, 4 Cir., 316 F. 2d 191, 199 (1963); but their inapplicability is clear, because, unlike the instant case where interpretation and application of the collective contract is vital and a *sine qua non* to Rumbaugh's right to assert that Unions violated their duty of fair representation, both *Conley* and *Thompson* avowed *the contract is only incidentally involved;* and, secondly, membership in the bargaining *unit* was not an

issue in either *Conley* or *Thompson*. Moreover, Rumbaugh's dispute was not limited to Unions: it initiated with Railroad and Carbon. In other cases cited by the Fourth Circuit (A. 16a, fn. 7) employees were concededly in the bargaining unit.

Similarly, it fails to distinguish between cases in which district court jurisdiction was sustained because the issue related to the labor contract's *validity* rather than *interpretation*. The Fourth Circuit's misconception of the law is further manifest by its reliance (A. 16a-17a) upon such cases such as *Steele* v. *L & N R.R.*, 323 U.S. 192, *Tunstall* v. *Bro. of Loco. Firemen*, 323 U.S. 210, *Graham* v. *Bro. of Locomotive Firemen*, 338 U.S. 232 (1949), *BRT* v. *Howard*, 343 U.S. 768 (1952) and *Felter* v. *Southern Pac. Co.*, 359 U.S. 326 (1959), each of which involved the *validity* of agreements. Indeed, *Howard* notably observes (343 U.S. 774), "The claims cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board" and "This dispute involves the *validity* of the contract, not its meaning". *Felter*, too, declared the case involved "no question" of contract interpretation or application but "*validity* under the statute" (359 U.S. 327, fn. 3). That *Cunningham* v. *Erie R. R.*, 2 Cir., 266 F. 2d 411 (1959) was not concerned with contract interpretation is recognized by Circuit Judge Medina who wrote the opinion and who in a later case [*Latham* v. *B & O Rr. Co.* et al, 2 Cir., 274 F. 2d 507, 511 (1940)] said: "Thus *Cunningham* presented a question of *statutory interpretation*".

The Fourth Circuit points to no case expressly holding that, under the complaint's allegations, and under the Fourth Circuit's own recognition that an interpretation and application of a collective agreement is involved, there is federal district court jurisdiction to resolve that interpretative process. As shown herein (post, p. 17), other federal courts reach a contrary conclusion. Indeed, *Steele* v. *L & N R. R.*, 323 U.S. 192 (1944), upon which the Fourth Circuit places heavy reliance, was careful to observe that *Steele's*

question was not one which Congress had delegated under the Act's administrative scheme and that "*Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board*" (323 U.S. 205).

B. The Fourth Circuit's Holding Is Offensive To This Court's Opinions Expressive of National Labor Policy.

The Fourth Circuit's holding (A. 19a) that unless there is district court jurisdiction "there would be no forum, judicial or administrative, competent to grant relief", mirrors Rumbaugh's allegation (A. 51a) that "there was no administrative remedy available to him" since Railroad discharged him "prior to the settlement of his dispute contrary to" the bargaining agreement and because Railroad advised him "he had no rights under the agreements as he was a supervisory employee" (A. 51a-52a). But, this Court has rejected the concept that the Act's procedures are within the discretion of interested parties, and in *BRT* v. *Chicago River etc. Co.*, 353 U.S. 30, 35 (1957) proclaimed, "Section 3, First, reads otherwise and should be literally applied". So too, *California* v. *Taylor*, 353 U.S. 553, 558-9, characterizes Adjustment Board procedures as "compulsory arbitration"; and where a retired employee sought extra compensation for services performed during employment, which involved a collective agreement's interpretation, *Pennsylvania Rr. Co.* v. *Day*, 360 U.S. 548, 552 (1959) holds the Adjustment Board's primary jurisdiction to be exclusive. More recently, *Bro. of Locomotive Engrs.* v. *L & N Rr. Co.*, 373 U.S. 33 (1963), said this Court's decision interpreting Section 3 First "have made it clear that this statutory grievance procedure is a mandatory, exclusive and comprehensive system for resolving grievance disputes" and that "*an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement*" (p. 38).

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) and *Local No. 207, Iron Workers Union* v. *Perko*,

373 U.S. 701, are among cases in which this Court has firmly established as a part of national labor policy the principle that when a matter is even "arguably" subject to a labor statute, courts must defer to the exclusive competence of the administrative agency chosen by Congress to deal with the matter. *Pennsylvania Rr. Co.* v. *Day*, 360 U.S. 548 (1959) applied the principle to the Railroad Labor Act, professing (p. 554) that "not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the . . Act". The rationale expressed in *Perko* (373 U.S. 707) that "It is evident that this case presents difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole' " is equally compelling in the administration of day-to-day problems under the Railway Labor Act.

C. The Fourth Circuit's Holding that Interpretation and Application of the Collective Agreement as to Whether Rumbaugh Was an Employee In the Bargaining Unit Was Within the Jurisdiction of a Federal District Court, and Not Within That of the National Railroad Adjustment Board, Conflicts with Decisions of the Third, Fifth, Seventh and Eighth Circuits.

The opinion's grant of jurisdiction to the district court and its rejection of National Railroad Adjustment Board's jurisdiction to interpret and implement the provisions of the collective agreement collides with opinions of four federal appellate courts.

A damage action instituted by employees against a union alone because it had allegedly refused to represent them and discriminated against them and had deprived them of part of their employment was dismissed by the Eighth Circuit in *Hester* v. *BRT*, 8 Cir., 206 F. 2d 279 (1953) because, as the Eighth Circuit stated, plaintiff therein could not recover *"without an ability on their part to establish, in the manner and upon the basis required by the Railway Labor Act" that the employees "constituted part of the craft for*

which the Brotherhood of Railroad Trainmen was the statutory bargaining representative" and that "*the establishment of that fact as a status . . plaintiffs are not here in a position legally to make*"; that "*there is presented for consideration a disputed question of craft classification or craft scope under the Railway Labor Act, which it is not open to anyone to resolve except the National Mediation Board*"; and that "*until the plaintiffs have sought and obtained from the Mediation Board such an establishment of their claimed and disputed craft status, they necessarily are without any foundation in the situation for legally sustaining the critical allegation on which their suit is attempted to be rested*" (206 F. 2d 281, 282).

In an action brought by railroad employees seeking reinstatement and damages against both a railroad and a union, the Third Circuit in *Roberts* v. *Lehigh & New England Ry. Co.*, 3 Cir., 323 F. 2d 219, 222 (1963) declared:

> "A Federal district court has jurisdiction to determine the validity of a contract under the guarantees of the Act. On the other hand, *if the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation.*"

Similarly, where Negro railroad workers sued the union (of which they were members) and the railroad for abolishing jobs previously performed by them and wrongfully assigning similar work to others, the Fifth Circuit rejected federal district court jurisdiction because "this was really a suit on, and a controversy over, the interpretation of the collective bargaining agreement".[14] *Britton* v. *Atlantic*

[14] Despite this language, the Fourth Circuit lists—erroneously—*Britton* as supportive authority that 45 USCA 153 First (i) is not available in an employee-union dispute, ignoring [illegible] that the Fifth Circuit affirmed the district court's dismissal on the ground that exclusive jurisdiction was in the Adjustment Board (A. 16a, fn. 7).

Coast Line R. Co. et al, 5 Cir., 303 F. 2d 274 (1962). Affirmed: *King* v. *Atlantic Coast Line R. Co.*, 5 Cir., 323 F. 2d 1005 (1963).

Recently (June 17, 1964) the Seventh Circuit approved dismissal of a federal district court action against a railroad and a union charged with hostile discrimination because "It is clear from the gravamen of the complaint that interpretation and application of the collective bargaining agreement is directly involved". *Pickett* v. *New York Central Rr. and Bro. of Locomotive Firemen* etc., 7 Cir., 56 LRRM 2520 (1964).[13]

The Fourth Circuit's opinion offers no explanation as to why it does not regard *Roberts*, *Britton* and *Hester* as apposite.

Since the Fourth Circuit placed heavy reliance (A. 14a-15a) upon *Priest* v. *Chicago, R. I. & P. R. R.*, 8 Cir., 189 F. 2d 813 (1951), its inappositeness to the instant situation is made clear not only by *Hester*, but *Priest's* involvement was whether *Priest's* discharge lent itself to a common-law action for contract breach as authorized by *Moore* v. *Illinois Central Rr. Co.*, 312 U.S. 630 (1941), diversity of citizenship existing, or whether he had been furloughed in which event "the controversy" would involve "only the interpretation and application of the collective-bargaining agreement". Nothing in *Priest* permitted the district court jurisdiction to interpret or apply that agreement.

Resolution of the foregoing conflict with this Court's prior guides, with national labor policy, and with other federal appellate courts in the construction of the federal statute can be resolved only by this Court's grant of certi-

[13] It is noteworthy that the Seventh Circuit distinguishes the instant Rumbaugh case from its *Pickett* case on the ground that in *Pickett* the working agreement's interpretation and application is expressly alleged. Unions submit that had the Fourth Circuit's opinion not omitted that Rumbaugh's employment-status dispute originated with his railroad employer, the Seventh Circuit would have been able to have seen the similarity in the two cases as to the need for contract interpretation.

orari and determination of the question. The recurrence of the problem, in addition to the conflicts, warrants certiorari. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494; *Local 761, Int. Union etc. Workers* v. *NLRB*, 366 U.S. 667, 671. See *Fischer* v. *Pauline Oil and Gas Co.*, 309 U.S. 294, 296.

D. The Fourth Circuit's Opinions Are Believed to be Erroneous.

The reasons assigned for granting certiorari, as discussed in Reasons I, A to C, have been based upon the Fourth Circuit's holding that the complaint sufficed to allege a federal claim. Such discussions have, Unions believe, shown the Fourth Circuit's error in that holding.

Equally important however is Unions' position that the Fourth Circuit erred in its failure to sustain the district court's conclusion that it was without jurisdiction of the subject matter because the allegations of the complaint were "nothing more than a complaint for an unlawful discharge from his employment or a conspiracy" by defendants "to commit a common law tort" against Rumbaugh and that in the absence of diversity of citizenship, the district court could not entertain Rumbaugh's action (A. 5a).

Allegations of the complaint have already been detailed (*ante*, pp. 5-7). *The complaint did not charge a duty owing by Unions as a collective bargaining agent to Rumbaugh*; and *Steele*, *Conley*, and kindred cases including the Fourth Circuit's *Hostetler* v. *BRT*, 4 Cir., 287 F. 2d 457, 458 (1961) and *Thompson* v. *Sleeping Car Porters*, 4 Cir., 316 F. 2d 191 (1963) recognize the duty of "fair representation" is owing only toward those *employees who are within the bargaining unit of employees for whom a union has undertaken to act*. The Fourth Circuit's opinion recognizes this limitation upon the duty (A. 12a), and it admits the lack of diversity of citizenship (A. 21a). *Nor did the complaint accord plaintiff the status of an employee in the bargaining unit represented by Unions*. Yet, as the Eighth Circuit's *Hester* noted, Rumbaugh's status was not "a collateral, incidental or otherwise uncontrolling question . . *but the existence of*

that fact as a matter of concept and status under the Railway Labor Act is of the very essence of the present action" (206 F. 2d 282, fn. 2).

Appropriately therefore the district court noted (A. 2a) if an employee comes into the federal court complaining of a discharge, "jurisdiction necessarily rests upon diversity of citizenship and the law of the forum is applied", citing *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941); *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). As to the charges of conspiracy, nothing in the Railway Labor Act authorizes an action against a labor union based upon a conspiracy. It is thus clear the conspiracy allegations could be maintained only as a common-law action if and as authorized by the law of West Virginia. The district court correctly concluded the complaint's allegations stated "a common law tort against" Rumbaugh (A. 5a).

The Fourth Circuit patently misconceives the district court's reasoning in stating the lower court's conclusion was premised upon *Alabaugh* v. *B & O R. R.*, 4 Cir., 222 F. 2d 861, cert. den. 350 U.S. 839 (1955), rather than *Thompson* (4 Cir., 316 F. 2d 191), and it inaccurately attributed to the district court that "it declined to give weight to . . 'the current of judicial authority' " referring to *Cunningham* v. *Erie R. Co.*, 2 Cir., 266 F. 2d 411 (1959).

What the Fourth Circuit overlooked is the district court's distinguishment between that "current authority" and the instant case, correctly rejecting *Cunningham* where, as here, the controversy is "between an employee or his union vis-a-vis the railroad" (A. 3a), whereas in *Cunningham* "the thrust of the plaintiff's case was directed primarily, if not exclusively, against his Union representative, and the position of the Railroad in the pattern of litigation was *merely incidental* by reason of the collective bargaining agreement" (A. 4a). Moreover, in *Cunningham* membership in the bargaining *unit* was a conceded fact, as it was in *Thompson*.

II. The Fourth Circuit's Holding that Pendent Jurisdiction Exists Conflicts With Principles Enunciated in this Court's Guaranty Trust Co. v. York and Local 20, Teamsters v. Morton

In addition to holding there was federal district court jurisdiction to determine (1) whether under the bargaining contract Rumbaugh was within the unit for bargaining purposes and (2) whether Unions had violated their duty of fair representation, the Fourth Circuit held that the doctrine of pendent jurisdiction warranted district court jurisdiction to entertain the nonfederal common-law action based upon charges of conspiracy. Even assuming (though Unions deny) the complaint suffices to charge violation of a federal duty of fair representation, the Fourth Circuit's ruling as to pendent jurisdiction conflicts with principles heretofore established by this Court.[16]

1.

Public policy in West Virginia, where the alleged conspiracy allegedly occurred, makes positive such an action could not be maintained nor a judgment entered against Unions as unincorporated labor unions (A. 38a) for a common-law tort in any state court.

There is in West Virginia now, and has been since 1872, a constitutional command to the judiciary that "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature . ." Constitution of West Virginia, Article VIII, Section 21. Legislation consistent with the constitutional command is found in W. Va. Code 1931, as amended, Chapter 2-1-1. Recognizing such constitutional restriction, the Supreme Court of Appeals of West Virginia has repeatedly rejected common-law actions against unincorporated associations, in-

[16] Of course, if it is determined the complaint did not state a federal claim, then the doctrine of pendent jurisdiction is not applicable. *Bell v. Hood*, 327 U.S. 678 (1946); *Lankford v. Int. Bro. of Elec. Workers*, DC, N.D. Ala., 1960, 196 F. Supp. 661, aff'd. 5 Cir., 293 F. 2d 928 (1961), cert. den. 368 U.S. 1004.

cluding unincorporated labor unions.

In cases involving unincorporated associations, the West Virginia Supreme Court has noted its lack of disposition to encroach upon legislative powers, and refused to open the way to subject unincorporated associations to liability in the absence of permissive state legislation.

As to unincorporated labor unions, in an action for damages for an alleged conspiracy, the West Virginia court, in *Milam* v. *Settle*, 127 W. Va. 271, 32 S.E. 2d 269 (1944), reiterated its previously expressed rule that, absent a statute authorizing suit, an unincorporated society or association cannot be sued as an entity by its name, nor can a judgment be rendered against it merely by name. See also *West* v. *Baltimore and Ohio Railroad Company*, 103 W. Va. 417, 137 S.E. 654; *Simpson and Smith* v. *Grand International Bro.*, etc., 83 W. Va. 355, 98 S. E. 580. In *Milam* v. *Settle* (32 S.E. 2d 272), the Court declared, "How can it be said that service on members of an unincorporated association brings it into the action in any way, *when the court is powerless to render any judgment against it?*" The Supreme Court is positive in its profession that in West Virginia liability against an unincorporated labor organization is nonexistent. It said (32 S.E. 2d 275):

> "On the whole, not only has the Legislature of this State failed to enact any statute, which by direct terms, or through implication, authorizes suits and actions against unincorporated associations by name, *but it has, in our opinion, deliberately molded our laws so as to prevent suits or actions in any form against that class of unincorporated associations known as labor unions.*"

While Rule 17(b), Federal Rules of Civil Procedure, authorizes a suit against an unincorporated association, it provides for such suit "for the purpose of enforcing for or against it *a substantive right existing under the Constitution and laws of the United States.*" It is thus clear that

under Rule 17(b), a nonfederal, common-law tort action against unions may not be maintained. Even where a jurisdiction outside of West Virginia permitted suit to be brought against labor organizations as entities—which is not true in West Virginia—implementation of the rule of *Milam* v. *Settle* in such jurisdiction for alleged wrongful conduct allegedly occurring in West Virginia resulted in the Court's dismissing an action for damages. *Barlow* v. *Roche*, 161 A. 2d 58 (Mun. Ct. of App. D.C., 1960).

Thus, under West Virginia law and Rule 17(b), suit could not be maintained against defendant Unions for a common-law tort, nor would the district court have jurisdiction, power and authority to enter any judgment against the Unions, or either of them. The Fourth Circuit's error is emphasized by this Court's declaration in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-9 (1945), where it stated:

> "*But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State . .*"

Notably, in the case at bar, even diversity of citizenship admittedly is lacking.

In *York*, the Supreme Court emphasized that the "nub of the policy" of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, "is that for the same transaction the accident of a suit . . in a federal court instead of in a State court a block away should not lead to a substantially different result" (326 U.S. 109).

The Fourth Circuit's rejection of Unions' contention is challenged by this Court's enunciation in *Local 20, Teamsters* v. *Morton*, 12 L. ed 280, 284, that "if the state court would be without authority to award damages under state law, then the doctrine of pendent jurisdiction can give 'the District Court . . no greater power to do so' ".

2.

As already noted (p. 12), the permissive jurisdiction accorded the district court to try the nonfederal claims of wrongful discharge and conspiracy deprived Unions of their day in court as to this crucial jurisdictional issue. Further, it collided with the Fourth Circuit's previous rejection of the doctrine of pendent jurisdiction in *UMWA* v. *Patton*, 4 Cir., 211 F. 2d 742 (1954), saying (p. 748), "There is no diversity of citizenship and the plaintiffs are entitled to invoke the jurisdiction of the federal courts only because they sue on a cause of action created by a federal statute. ." *Patton's* approval by this Court is noted in *Local 20, Teamsters* v. *Morton*, 12 L ed. 2d 287, fn. 17 (May 25, 1964).

Unions argued in their rehearing petition (A. 43a) that since the rationale of *Hurn* v. *Oursler*, 289 U.S. 238 (1933) is predicated upon the thesis that both federal and nonfederal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U.S. 246, the doctrine of federal preemption rendered inapplicable pendent jurisdiction because Congress had occupied the field of the type of conduct involved and thereby foreclosed state court jurisdiction to entertain a common-law tort action for damages based thereon, citing *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173; *Sherlock* v. *Alling*, 93 U.S. 99, 104 (A. 43a). The Fourth Circuit made no response to Unions' contention other than to regard Unions citations as "either not in point, or cumulative, or distinguishable"—though offering no explanation (A. 26a).

Notably, the Fourth Circuit employed both *Hurn* and the Sixth Circuit's *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, 42, cert. den. 371 U.S. 891, to support its warrant of pendent jurisdiction. This Court discredited and rejected these cases in *Local 20, Teamsters* v. *Morton*, 12 L. ed 2d 284. It is noteworthy that in *Flame* (303 F. 2d 42),

the Sixth Circuit supported its pendent jurisdiction holding by *UMWA* v. *Meadow Creek Coal Co.*, 263 F. 2d 52, cert. den. 359 U.S. 1013 (1959) and *UMWA* v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U.S. 881 (1960). In the case at bar, the Fourth Circuit relied upon *Flame*, *Meadow Creek* and *Osborne* (A. 23a) as authority that pendent jurisdiction authorized the "district court to entertain" the common law action. Unions submit this Court's rejection of *Flame* carried with this Court's disapproval also of *Meadow Creek* and *Osborne*. The doctrine of pendent jurisdiction has no application where the doctrine of federal preemption applies.

Correction of the unwarranted assumption of federal jurisdiction of state common-law tort claims—particularly in light of the discussed public policy of West Virginia—, as well as this Court's rejection of pendent jurisdiction where federal preemption exists, invites issuance of the certiorari writ herein.

CONCLUSION

For the reasons assigned, Petitioners, and each of them, pray that the Petition for Writ of Certiorari should be granted and that the writ issue to review the opinions, judgments and order of the United States Court of Appeals for the Fourth Circuit, entered in Case No. 9022 on March 2, 1964, and May 1, 1964, respectively.

Respectfully submitted,

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July 15, 1964

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

Civil Action No. 2478

LUTHER RAY RUMBAUGH,
Plaintiff,

v.

WINIFREDE RAILROAD COMPANY, a corporation;
THE CARBON FUEL COMPANY, a corporation;
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA;
DISTRICT 50 UNITED MINE WORKERS OF AMERICA; AND
UNITED MINE WORKERS OF AMERICA,
Defendants.

Opinion

In this action the plaintiff seeks to recover damages from the defendant corporations for his alleged wrongful discharge and joins the defendant Union for its alleged discrimination against him in procuring his discharge. He alleges that this Court should take jurisdiction of the action by virtue of the provisions of the Railway Labor Act, the Taft-Hartley Act and the Interstate Commerce Act. The defendants have moved to dismiss the complaint on various grounds but it is necessary to consider only the question of this Court's jurisdiction over the subject matter of this action.

First, and of paramount importance, is the fact that this is not an action based upon diversity of citizenship. There is no allegation of diversity jurisdiction in the complaint, and on its face it is clearly evident that the requisites for such jurisdiction are lacking. This lack of diversity is important in the light of the statement in the complaint that the plaintiff has elected to treat his discharge as final and sue for damages for wrongful discharge. It is now well settled that an employee, alleging his wrongful discharge,

may, if he chooses, challenge the validity of his discharge before the Adjustment Board under the provisions of the Railway Labor Act or, in the alternative, treat such discharge as final and resort to the courts. However, if he comes into a federal court, jurisdiction necessarily rests upon diversity of citizenship and the law of the forum state is applied. *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630; *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653; see also *Hilton* v. *Norfolk and Western Railway Company*, 194 F. Supp. 915. The benefit of this exception to the primary jurisdiction of the Adjustment Board is not available to the plaintiff here by reason of the patent lack of diversity between the parties.

Plaintiff contends, however, that the alleged discriminatory participation by the defendant Union presents a state of facts that entitles him to seek redress in the federal courts, and relies strongly upon the Second Circuit decision in *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411. It is true that *Cunningham* recognized an extension of federal jurisdiction in this area which had its genesis in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; and the companion case of *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210. In considering a proposed amendment to the collective bargaining agreement which would have excluded all Negro firemen from service, the Court in *Steele* observed that the Railway Labor Act cast upon a union the duty "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." In that case the Court concluded that since the administrative remedies under the Act were not available in a dispute between employees and their representative, the grievance of the employees for breach of the statutory duty by the union was of judicial cognizance. The companion *Tunstall* case likewise involved alleged discrimination by the union against certain Negro employees, and the great majority

of the cases which followed in the wake of *Steele* v. *Louisville & Nashville* dealt with discrimination based upon race or color. In cases involving alleged discriminatory practices under circumstances other than those involving race or color, many of the courts refused to extend the scope of this exception to the primary or exclusive administrative jurisdiction of the Adjustment Board under the Act. The Fourth Circuit took this restrictive viewpoint in *Spires* v. *Southern Railway Co.*, 204 F. 2d 453, and *Alabaugh* v. *Baltimore and Ohio Railroad Co.*, 222 F. 2d 861. In the latter case, Judge Parker, in commenting upon *Steele* and *Tunstall*, stated at pages 866 and 867:

> " • • • but those cases dealt with racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle.
>
> " • • • Logically it may seem that if a court has jurisdiction to protect rights against racial discrimination it should have jurisdiction to protect them against discrimination on account of union membership; but the answer is that the Adjustment Board was not set up to deal with racial controversies, but controversies arising out of labor relationships."

Admittedly, however, in cases where the crux of the controversy involves a charge of discrimination by the employee against his union representative rather than a controversy between an employee or his union vis-a-vis the railroad, the current of judicial authority in this area has trended in the direction of the *Cunningham* case. See *Latham* v. *Baltimore and Ohio Railroad Company*, 274 F. 2d 507; *Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604; *Nobile* v. *Woodward*, 200 F. Supp. 785.

Some indication of this acceptance of the principle of *Cunningham* has appeared in the Fourth Circuit in the Dis-

trict Court opinion in *Hostetler* v. *Brotherhood of Railroad Trainmen*, 183 F. Supp. 281, and in the dissenting opinion of Judge Bryan in the same case on appeal in 287 F. 2d 457, at page 463 where he observed:

> " * * * A strict, constant and delicate sensibility of the bargaining representative to its trust has repeatedly been enjoined upon the union by the Supreme Court. Conley v. Gibson, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. That the factual basis of these cases was race or color does not in the slightest dilute the unequivocal command of fairness they give the bargaining agent."

However in *Chapman* v. *Local* 104 *of International Association of Machinists*, 199 F. Supp. 186, Judge Watkins recognized the conflict between *Cunningham* and *Alabaugh* and concluded that in this Circuit the District Court was bound to follow the restrictive concept of *Alabaugh*.

In any event, however, the *Cunningham* case is of no assistance to the plaintiff here for it could have no application upon the record in this case. In *Cunningham* as well as the other cases in this area, the thrust of the plaintiff's case was directed primarily, if not exclusively, against his Union representative, and the position of the Railroad in the pattern of litigation was merely incidental by reason of the collective bargaining agreement. The Railroad is ordinarily a party in such a suit only because the plaintiff seeks a reinstatement of his employment status or restoration of certain rights thereunder. See *Latham* v. *Baltimore and Ohio Railroad Company* and *Nobile* v. *Woodward*, *supra*. The nature of the litigation is such that the Railroad was not considered an indispensable party in *Conley* v. *Gibson*, 355 U.S. 41. In the latter case the nature of the controversy as the basis for federal jurisdiction and the posture of the Railroad therein was stated as follows at page 44:

> "* * * This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination. Furthermore, the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent."

The prolix and ambiguous complaint in the present case goes far afield from a mere complaint of alleged discriminatory treatment of the plaintiff by the Union representative in exercising its authority by virtue of the Act; and it would cast the defendant corporations in a position far different from that of innocent bystanders whose presence is merely incidental by reason of the collective bargaining agreement. It alleges that the defendant corporations actively conspired with the Union to bring about plaintiff's discharge, and charges that the Railroad controlled the Union in a manner that was detrimental and discriminatory toward the employees. The plaintiff does not seek a determination or restoration of his employee status, but rather asks to recover damages for his wrongful discharge. A distillation of the plaintiff's allegations indicates that they are nothing more than a complaint for an unlawful discharge from his employment or a conspiracy upon the part of the defendants to commit a common law tort against the plaintiff. Jurisdiction of these causes of action cannot be entertained by this Court in the absence of diversity of citizenship between the parties. Accordingly, the motions to dismiss will be granted.

Order and Judgment

On this the 15th day of April, 1963, again came plaintiff Luther Ray Rumbaugh, by William F. Carroll, E. Franklin Pauley and Edwin M. Young, his attorneys; defendants Winifrede Railroad Company, a corporation, by F. Paul Chambers, its attorney; The Carbon Fuel Company, a corporation, by James Knight Brown, its attorney; and also came defendant Local Union 14182, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; defendant District 50, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; and defendant United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; each of said defendant unions appearing specially and not generally; and thereupon this cause came on for determination upon the bill of complaint, the respective written motions of defendant Winifrede Railroad Company and defendant The Carbon Fuel Company to dismiss the action, and the respective written motions to dismiss, to quash summons and service thereof and return of service thereon and notices of motion of defendant Local Union 14182, United Mine Workers of America, defendant District 50, United Mine Workers of America, and defendant United Mine Workers of America, respectively, together with the affidavit of Thomas Kennedy and the exhibits attached thereto and the affidavit of Edward Hunter, filed in support of said motions, all of which, if not heretofore filed, are ORDERED filed as a part of the record in this case; and the Court having heretofore heard oral arguments by said parties and having maturely considered the same, as well as written briefs filed by each of the respective parties, and being of opinion for the reasons set forth in a written opinion dated January 29, 1963, which is ORDERED filed as a part of the record herein, that there is no diversity of citizenship and that this Court is without jurisdiction over the subject matter of this action, and that each of said motions to dismiss should be sustained,

It is therefore ORDERED that each of the several motions to dismiss said complaint and action filed by the defendants herein be and the same are hereby sustained; that plaintiff take nothing by his action and complaint; that said action be dismissed and removed from the docket, and that each of the defendants recover against said plaintiff its costs. To which counsel for plaintiff excepts.

APPENDIX B

Filed March 2, 1964

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued September 27, 1963. Decided March 2, 1964.)

Before SOBELOFF, Chief Judge, BOREMAN, Circuit Judge, and NORTHROP, District Judge.

Edwin M. Young (E. Franklin Pauley on brief) for Appellant, and F. Paul Chambers (James K. Brown and Jackson, Kelly, Holt & O'Farrell on brief) for Appellees Winifrede Railroad Company and Carbon Fuel Company, and M. E. Boiarsky for Appellees Unions.

SOBELOFF, Chief Judge:

This is another in the succession of cases since *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), involving

interpretation of the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, and determination of the scope of federal judicial power in its administration.

Rumbaugh has joined his former employer, Winifrede Railroad Company, and the union designated as the bargaining representative for local railroad employees as co-defendants in an action to recover damages allegedly caused by the independent and combined efforts of the defendants to effect his discharge. Since there is no diversity of citizenship between the parties, federal jurisdiction must be predicated upon a claim arising under the laws of the United States 28 U.S.C.A. §§ 1331, 1337. No such federal question was recognized by the District Court for the Southern District of West Virginia and the complaint was dismissed for lack of jurisdiction over the subject matter, the District Court holding that exclusive jurisdiction was in the Railroad Adjustment Board.

This disposition of plaintiff's claims raises two fundamental jurisdictional questions. First, is there federal court jurisdiction over an employee's suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit, which the union is statutorily obligated to represent? Second, does an employee have such a federal claim against his employer for wrongful discharge that jurisdiction will lie in a federal court regardless of the citizenship of the parties?[1]

THE COMPLAINT

Essentially, Rumbaugh's grievance against the union is that it, as the local bargaining representative, discriminated

[1] An affirmative answer to either question could well enable plaintiff to resort to a federal forum since, under the doctrine of pendent jurisdiction, a federal court's jurisdiction based on a federal claim extends to any nonfederal claim in the case if the claims constitute a single cause of action. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L.Rev. 1018 (1962); *cf. United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F.2d 52, 59-60 (6th Cir.), *cert. denied* 359 U.S. 1013 (1959).

against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge through false charges filed with his employer. His complaint against the railroad arises from allegedly false representations made to him by company officials that he was not covered by the collective bargaining agreement and his subsequent summary discharge, which he asserts was unlawful. He further charges that there was collusion between the union and his employer to effect his dismissal.

As factual support for the claims of unfair representation, wrongful discharge and conspiracy, the complaint states that the plaintiff went to work for the railroad in 1928 as a laborer and by 1959 had risen to the position of senior mechanic. Although designated as a foreman, Rumbaugh maintains that his duty was merely to verify locomotive inspection reports, and this entailed no supervisory functions whatsoever. Even though not a member of Local 14182 United Mine Workers, the plaintiff asserts that he has been unlawfully discriminated against by the bargaining agent in rejecting all of his applications for membership, while accepting similar requests from his fellow workers. He insists that the collective bargaining agreement adopted on November 7, 1958, imposed a duty on the union to represent him fairly as one of the specified "non-supervisory men."

From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague. Thinking the assignment unfair, the plaintiff was moved to inquire of a union agent about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was "briskly informed" by the agent that no such right existed and displeased as well with changes being

effected in rates of pay and work rules, Rumbaugh approached the president of Winifrede Railroad and was assured that a full investigation of the matter would be made and, if necessary, a complete hearing arranged. Neither step was ever taken. This prompted the plaintiff to inquire further of the union agent on October 14, 1959, as to the union's compliance with the statutory requirement that union-management contracts and pertinent work rules be filed with the National Mediation Board. Thereafter, on the same day, it is alleged that a union agent, conspiring with other union agents and an officer of the railroad, filed with the employer "charges against complainant on the false ground that he [Rumbaugh] was discriminating against the union" and requested that he be fired. The next day, October 15, 1959, Rumbaugh was summarily dismissed without explanation.

This suit for compensatory and punitive damages totalling $300,000 was instituted to redress the claimed discriminatory, wrongful and collusive behavior of the defendants.

CLAIM AGAINST THE UNION

Duty of Fair Representation

Since the landmark case of *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the principle has become unchallengeable that the federal courts have subject-matter jurisdiction to enforce the judicially-created duty imposed upon bargaining agents to represent all employees in the bargaining unit fairly and without racial discrimination.[2] Originally this court in *Alabaugh* v. *Baltimore & O. R.R.*, 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1955), adopted the view that federal jurisdiction over alleged violations of the "duty of fair representation" was re-

[2]See also *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *cf. Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955).

stricted to cases of racial discrimination. The District Court, following this guide, declined to give weight to what it recognized to be "the current of judicial authority" toward expansion of the union's obligation to include all forms of hostile treatment and discrimination regardless of race.[3]

While the District Court's conclusion, when rendered, was consistent with the position theretofore taken by this court, it does not reflect the broader principle which we subsequently announced in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963). There we specifically stated that *Alabaugh* "represents too narrow a view" and that the judicially enforceable duty of fair representation "should be interpreted as also prohibiting invidious discrimination that is not based upon race." *Id.* at 198. Thus we held that an allegation of breach of the statutory duty, even if not based upon racial discrimination, is within the jurisdiction of the federal courts.

Membership in the Bargaining Unit

We also recognized in *Thompson* that no less protection should be afforded to an aggrieved non-union member who is within the bargaining unit for which the union is the bargaining agent than is afforded to a member of the union.[4] Because the duty extends only to those employees whom the union is empowered to represent and because a union cannot be expected to look after the needs and demands of workers who are not covered by the collective bargaining agreement, an employee must establish, as part of his case, that he is a member of the designated bargaining unit.

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[3]See *Humphrey* v. *Moore*, 32 U.S.L.W. 4055, 4057 (January 7, 1964); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 198 n.15 (4th Cir. 1963); Blumrosen, "The Worker and Three Phases of Unionism," 61 Mich. L. Rev. 1435, 1470 (1963).

[4]See also *Conley* v. *Gibson*, 355 U.S. 41, 42 (1957); *Syres* v. *Oil Workers Int'l Union*, 350 U.S. 892, *affirming* 223 F.2d 739, 742-43 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255 (1944); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 197 (4th Cir. 1963); *Hostetler* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 457, 458 (4th Cir. 1961).

Rumbaugh maintains that the union's duty of fair representation extends even further. His theory is that when discrimination is alleged, the complainant's status relative to the bargaining unit is immaterial. As support for this contention he cites *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). But in that case the Supreme Court rejected the proposition that *Steele's* prohibition against racial discrimination was inapplicable because the plaintiffs, train porters, were not designated as brakemen, the class of employees represented by the Brotherhood. The Court said that the central issue was the legality of the collective bargaining agreement which the white union had secured and which had the effect of requiring the carrier to eliminate all Negro train porters and substitute white brakemen in their places.

We agree that the Court disregarded the artificial classification of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification. The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as "employees" within the meaning of the Railway Labor Act.

The union's position is that Rumbaugh is not within the unit it represents, because he is a supervisor. It contends that exclusive jurisdiction to determine his employment classification (*i.e.*, whether he is a supervisor or a non-supervisor) lies either with the National Railroad Adjustment Board as a question arising "out of the interpretation or application of agreements," 45 U.S.C.A. § 153 First (i), or with the National Mediation Board as a dispute concerning craft classification or representation, 45 U.S.C.A. § 152 Ninth.

Rumbaugh's rejoinder is that the complaint, the well-pleaded facts of which are to be taken as true for purposes of the motion to dismiss, establishes his non-supervisory status when it avers that:

> "He was an hourly paid employee with no authority to hire, fire or discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports."

Rumbaugh makes the point that the District Court should at least have heard evidence on the issue of his employment status before concluding that the allegations of the complaint are insufficient to establish federal jurisdiction.

The general principle that pleadings are to be liberally construed was applied in *Priest* v. *Chicago, R.I. & P. R.R.*, 189 F.2d 813 (8th Cir. 1951), a case strikingly similar to the one at hand. There a discharged railroad metal worker brought suit against his former employer, alleging *inter alia*, that the carrier and the union had discriminated against him by disregarding his superior seniority rights and effecting his discharge because of his membership in another union. The plaintiff prayed for monetary damages, reinstatement and an injunction. The defendant answered that exclusive jurisdiction lay in the National Railroad Adjustment Board because the dispute was between an employee and a carrier growing out of the interpretation or application of a collective agreement. The District Court adopted the union's view without holding a hearing and granted its motion to dismiss for lack of jurisdiction. The Court of Appeals reversed.

> "It seems probable that when this case is tried the evidence will show that the plaintiff was never discharged, but was, as the defendant asserts, merely laid off or furloughed, due to a reduction of force, and

> that the controversy involves only the interpretation and application of the collective bargaining agreement referred to in the complaint." *Id.* at 815.

In spite of this the court found itself unable to say "to a legal certainty" that there was no jurisdiction and therefore held that "the District Court should not have attempted to decide the question of its jurisdiction from allegations of the complaint and of the motion to dismiss, but should have taken evidence to show the exact factual basis for the plaintiff's claim before ruling upon the question of jurisdiction."[5]

Postponement of the final resolution of the jurisdictional problem until the District Court has had an opportunity to sound the complaint for its underlying factual and legal bases, as was done in *Priest* and other cases,[6] was required in the present action unless it were clear from the pleadings that, in so doing, the federal court would usurp the statutory power of the administrative agencies created by the Railway Labor Act. In this regard the union calls attention to the specific wording of the Act and to court decisions which, it says, indicate that exclusive competency is with either the National Railroad Adjustment Board or the National Mediation Board rather than with the federal courts to determine whether a discharged railroad employee was, prior to his release, a member of the bargaining unit which the union was duty-bound to represent. We disagree with the union's interpretation for the reasons now to be stated.

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[5] Ours is not a case where the complaint presents only conclusions of fact unsupported by allegations of specific facts upon which the conclusions rest such that the facts cannot be regarded as well pleaded. See *Homan Mfg. Co.* v. *Russo*, 233 F.2d 547, 550 (7th Cir. 1956); *Rishel* v. *Pacific Mut. Life Ins. Co.*, 78 F.2d 881, 886 (10th Cir. 1935).

Nor is it a case of legal conclusions cast in the form of factual allegations. See *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960).

[6] See *Brotherhood of Railroad Trainmen* v. *Central of G. Ry.*, 305 F.2d 605 (5th Cir. 1962); *Koelker* v. *Baltimore & O. R.R.*, 140 F. Supp. 887, 890 (E.D. Pa. 1956); *Hawn* v. *American S.S. Co.*, 26 F. Supp. 428 (W.D.N.Y. 1939) (evidence of plaintiff's status as a "seaman").

Employee-Union Disputes Not for the Railroad Adjustment Board

Section 153 First(i) of 45 U.S.C.A. provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *."

The plain meaning of this section is that the Board is charged with the responsibility of adjudicating controversies between employees and their employer, the carrier, and not those involving employees and their bargaining representative. This interpretation has been reiterated many times since the Supreme Court's landmark decision in *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), where this section was interpreted as follows:

> "Section 3, First (i) [45 U.S.C.A. § 153 First (i)], which provides for reference to the Adjustment Board of 'disputes between an employee or group or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to disputes between employees and their representative." *Id.* at 205.

Later cases have followed this reading of the statute.[7]

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[7] *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 213 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 239 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Order of Railway Conductors* v. *Southern Railway*, 339 U.S. 255 (1950); see *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 550 (1959); *Haley* v. *Childers*, 314 F.2d 610, 615-17 (8th Cir. 1963); *Gainey* v. *Brotherhood of Ry. & S.S. Clerks*, 275 F.2d 342, 344 (3d Cir. 1960); cf. *Pelter* v. *Southern Pac. Co.*, 359 U.S. 326, 327 n.3 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963); *Britton* v. *Atlantic C. L. R.R.*, 303 F.2d 274 (5th Cir. 1962); *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961).

The union, however, asserts that two Supreme Court decisions cast doubt on the above-stated rule. But we think that the Court in these

(Footnote continued on next page)

These pronouncements of the Supreme Court make it clear that the Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment.

Nor do we find that the joinder of the railroad as a defendant in this claim changes the situation. In the first place, federal jurisdiction was not deemed destroyed by joinder of railroads in actions for discrimination in cases such as *Steele*, *Howard* and *Graham*. And in *Cunningham* v. *Erie R.R.*, 266 F.2d 411 (2d Cir. 1959), a suit for discrimination brought by a former employee against the union and the employer, the court said at page 416:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it also has power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."

There the employee's grievance, asserted against both the union and the railroad, was that he was "discriminatorily

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cases took great pains to reaffirm *Steele* and its interpretation of the statute. In the first, *Slocum* v. *Delaware, L. & W. RR.*, 339 U.S. 239 (1950), the Court held that a dispute between two unions concerning the scope of their respective agreements could not be resolved in a state court on a motion by the railroad for a declaratory judgment because such controversies are within the exclusive competency of the Adjustment Board, the agency authorized to settle "railroad-employee disputes growing out of the interpretation of existing agreements." *Id.* at 243. But in an accompanying footnote, *id.* at 244 n.7, the Court emphasized that "[W]e are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192."

In a second case, *Conley* v. *Gibson*, 355 U.S. 41 (1957), it was stated that:

> "This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. [footnote omitted] The Adjustment Board has no power under § 3 First(i) or any provision of the Act to protect them from such discrimination."

Specific reference to the jurisdictional distinction between employee-employer suits and employee-bargaining agent actions was again made, the Court stating in footnote 4, page 44, "[f]or this reason the decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, is not applicable here."

discharged." The court held that the presence of the railroad as a party defendant did not defeat federal court jurisdiction because exclusive Adjustment Board jurisdiction extends only to employee-employer disputes and since the railroad was "brought in only because it claimed it was required by law to discharge persons who had been removed as members of the union for non-payment of dues," the controversy was essentially between the employee and the union, with the railroad only incidentally involved. We think the principle applicable in the present case. Rumbaugh has joined the railroad to his discrimination charge only because he is claiming that, in consequence of its active participation in the union's discriminatory conduct, he was unlawfully discharged. For this reason the *Cunningham* holding is apposite.[6]

Furthermore, *Cunningham* is in accordance with the salutary principles of avoiding a multiplicity of suits and expediting the final determination of litigation which are the foundation of Rule 20(a), Fed. R. Civ. P. Because a railroad is not an indispensable party to an employee's action against the union for invidious discrimination, as the Supreme Court held in *Conley* v. *Gibson*, 355 U.S. 41 (1950), the joinder is permissive and is governed by the following standard:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action * * *." Rule 20(a), Fed. R. Civ. P.

Under this rule joinder of parties-defendant is governed by the concepts of "same transaction" and "common

[6]Later in this opinion we deal with the separate claim against the railroad for wrongful discharge.

question of law or fact.'[9] The allegations here satisfy these requirements.

Judicial Interpretation of the Collective Agreement Is Not Forbidden

Though resolution of the issue whether or not Rumbaugh is a supervisor may require an interpretation of the collective bargaining agreement, the federal courts are not ousted from their function merely because, under certain circumstances, interpretation is delegated to the Board.[10] Here, as we have shown, the Board lacks jurisdiction. This being so, and the cause of action for invidious discrimination being cognizable by the federal courts, they have the power—and the duty—to interpret the agreement. Otherwise there would be no forum, judicial or administrative, competent to grant relief.

Jurisdiction of the National Mediation Board

We also find that the National Mediation Board is without jurisdiction over this case. The Railway Labor Act, 45 U.S.C.A. § 152 Ninth, provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees • • • it shall be the duty of the Mediation Board, upon request of either party to the dispute,

[9] See generally 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 533 (1961); 3 MOORE, FEDERAL PRACTICE par. 20.06 (1948); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'Transaction' [as used in Rule 20(a)] is a word of flexible meaning. It may comprehend a series of many occurrences • • •.")

[10] See *Heisler* v. *Parsons*, 312 F.2d 172, 176 (7th Cir. 1962); *cf. Virginian Ry* v. *System Fed'n No. 40*, 300 U.S. 515 (1937); *Brotherhood of Locomotive Firemen* v. *Northern Pac. Ry.*, 274 F.2d 641 (8th Cir. 1960); *Switchmen's Union* v. *Southern Pac. Co.*, 253 F.2d 81 (9th Cir. 1957); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic C. L. R.R.*, 201 F.2d 36 (4th Cir. 1953).

The fact that interpretation of collective agreements was involved has not in the past prevented courts from retaining jurisdiction of actions to enforce the duty of fair representation. *Conley* v. *Gibson*, 355 U.S. 41, 44-45 (1957); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 199 (4th Cir. 1963).

to investigate such dispute and to certify to both parties • • • the name or names of the individual or organizations that have been designated and authorized to represent the employees • • •."

The case of *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 323 (1943), makes it clear that the jurisdiction of the National Mediation Board is limited to disputes between rival employee representatives." The Board is limited to resolving jurisdictional disputes and settling controversies between unions as to where "the authority of one craft ends and the other begins or of the zone where they have joint authority." *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323, 334-35 (1943). The Board's jurisdiction does not extend to controversies, such as the one now under consideration, between an employee and his bargaining agent.

Since neither the Railroad Adjustment Board nor the National Mediation Board is the proper forum for this case, we hold that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction without first hearing evidence on the question of Rumbaugh's employment status. Should the District find, after examining the facts, that Rumbaugh was not a supervisor, then the action for invidious discrimination should be heard on the merits. Should it find that he was a supervisor, and therefore not within the unit represented by the union, a motion to dismiss could then properly be entertained.

"See, e.g., *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943); *Flight Eng'rs Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745, 747 (2d Cir. 1963); *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F.2d 17, 19-20 (4th Cir. 1962); *Hester* v. *Brotherhood of Railroad Trainmen*, 206 F.2d 279 (8th Cir. 1953); *Brotherhood of Railway & S.S. Clerks* v. *Atlantic C.L. R.R.*, 201 F.2d 36, 38-39 (4th Cir. 1953); *O'Donnell* v. *Pan American World Airways, Inc.*, 200 F.2d 929, 931 (2d Cir. 1953); *Rose* v. *Brotherhood of Railway & S.S. Clerks*, 181 F.2d 944, 946 (4th Cir. 1950); *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't*, 93 F.2d 340 (6th Cir. 1937); *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F.2d 757 (D.C. Cir. 1936).

CLAIM AGAINST THE RAILROAD

Relying upon the established doctrine that a discharged railroad employee may at his option challenge the validity of his discharge before the Railroad Adjustment Board and seek reinstatement and back pay or, after accepting the dismissal as final, bring a civil suit against the railroad for unlawful discharge,[11] Rumbaugh further asserted in his complaint that he was electing to pursue the latter course. He also joined the union as a defendant because it wrongfully procured his discharge by the railroad.

While it is indisputable that a claim for wrongful discharge is judicially cognizable, an action of this type is essentially one at common law for breach of contract and does not arise under the Railway Labor Act. Consequently, original federal jurisdiction can attach only when there is diversity of citizenship.[12] Since, as the District Court found, there is a "patent lack of diversity between the parties," no federal jurisdiction exists over Rumbaugh's claim for wrongful discharge unless the judicially created doctrine of "pendent jurisdiction" may be invoked.

The origin of this doctrine is generally attributed to the case of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). In broad terms it provides that original jurisdiction resting on the plaintiff's federal claim extends to any nonfederal claim that he may have against the same defendant provided

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[11] *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653 (1953); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Moore* v. *Illinois Cent. R.R.*, 312 U.S. 630 (1941); see, *e.g.*, *Roberts* v. *Lehigh & N. E. Ry.*, 323 F.2d 219, 223 n.5 (3d Cir. 1963); *Haley* v. *Childers*, 314 F.2d 610, 614-15 (8th Cir. 1963); *Cook* v. *Missouri Pac. R.R.*, 263 F.2d 954, 957 (5th Cir. 1959); *Cranston* v. *Baltimore & O. R.R.*, 258 F.2d 630, 631 (3d Cir. 1958); *Condol* v. *Baltimore & O. R.R.*, 199 F.2d 400 (D.C. Cir. 1952); *Cepero* v. *Pan American Airways, Inc.*, 195 F.2d 453 (1st Cir. 1952).

[12] *Duplisea* v. *Maine Cent. R.R.*, 260 F.2d 495 (1st Cir. 1958); *Stack* v. *New York Cent. R.R.*, 258 F.2d 739, 741-42 (2d Cir. 1958); *Smithey* v. *St. Louis S. Ry.*, 237 F.2d 637 (8th Cir. 1956); *Broady* v. *Illinois Cent. Ry.*, 191 F.2d 73, 78 (7th Cir.), cert. denied, 342 U.S. 897 (1951); *Bohannon* v. *Reading Co.*, 168 F. Supp. 662 (E.D. Pa. 1958); see generally Kroner, "Minor Disputes Under the Railway Labor Act," 37 N.Y.U. L. Rev. 41, 59 (1962).

that the federal question is substantial and the two claims together constitute a "single cause of action."[14] Application of the doctrine is appropriate in this case. Both the federal and the nonfederal claims are asserted by the same plaintiff against the same defendants.[15] The complaint presents one set of operative facts to support the two claims, thereby stating a "single cause of action."[16] Furthermore, it cannot be said that the federal claim is "obviously without merit," or clearly foreclosed by prior Supreme Court decisions,[17] or a matter that should be dismissed on the pleadings alone without presentation of some evidence.[18] By any of these standards of substantiality, Rumbaugh has alleged a nonfrivolous claim.[19]

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[14] See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938); *Lincoln Gas & Elec. Light Co.* v. *City of Lincoln*, 250 U.S. 256 (1919); *Siler* v. *Louisville & N. R.R.*, 213 U.S. 175 (1909); *Taussig* v. *Wellington Fund, Inc.*, 313 F.2d 472 (3d Cir.), cert. denied, 374 U.S. 806 (1963), noted in 49 Va. L. Rev. 1224 (1963); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L. Rev. 1018 (1962); Note, 71 Harv. L. Rev. 513 (1958).

[15] See *New Orleans Pub. Belt R.R.* v. *Wallace*, 173 F.2d 145 (5th Cir. 1949); *Pearce* v. *Pennsylvania R.R.*, 162 F.2d 524 (3d Cir.), cert. denied, 332 U.S. 765 (1947); cf. *Oliver J. Olson & Co.* v. *Marine Terminals Corp.*, 215 F. Supp. 490, 492 (N.D. Cal. 1962); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 191 F. Supp. 288 (E.D. Pa. 1960); Note, 62 Colum. L. Rev. 1018, 1027 (1962).

[16] *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933); see, e.g., *Landstrom* v. *Thorpe*, 189 F.2d 46, 51 (8th Cir.), cert. denied, 342 U.S. 819 (1951); *Kleinman* v. *Betty Dain Creations, Inc.*, 189 F.2d 546, 548 (2d Cir. 1951); *French Renovating Co.* v. *Ray Renovating Co.*, 170 F.2d 945, 947 (6th Cir. 1948). The Supreme Court employed the "substantially identical" language in a reapplication of the *Hurn* doctrine. *Armstrong Paint & Varnish* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938).

[17] E.g., *Levering & Garrigues Co.*, v. *Morrin*, 289 U.S. 103, 105-06 (1933); *Hannis Distilling Co.* v. *Mayor*, 216 U.S. 285, 288 (1910). See also *Binderup* v. *Pathe Exch. Inc.*, 263 U.S. 291, 306 (1923); *Mflheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923); *Strachman* v. *Palmer*, 177 F. 2d 427, 432 (1st Cir. 1949) Magruder, J., concurring. questions the "foreclosure by previous decision" aspect of the test.

[18] E.g., *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601 (1st Cir. 1959); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *Pure Oil Co.* v. *Puritan Oil Co.*, 127 F.2d 6 (2d Cir. 1942). See generally Comment, 46 Ill. L. Rev. 646 (1951).

[19] Presentation of a substantial claim for purposes of the *Hurn* doctrine does not mean that it is valid on the merits. And the fact that it is subsequently found invalid on the merits does not affect the court's jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); Note, 49 Va. L. Rev. 1224, 1228 n.9 (1963).

THE CONSPIRACY CLAIM

In addition to the independent claims against the defendants, Rumbaugh avers in his complaint that the railroad "did unlawfully join in the actions of the unions • • • and did conspire with the unions to obtain the discharge of the complainant and the damage to his property rights." Although no federal statute is cited which would authorize a district court to entertain such a common law action,[20] the doctrine of pendent jurisdiction is again appropriate for this purpose in the circumstances set up by the complaint.[21]

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[20] It does not appear that Rumbaugh in attempting to invoke the Civil Rights Act, 42 U.S.C.A. § 1985(3). *Cf. Walker* v. *Bank of America*, 268 F.2d 16 (9th Cir. 1959); *Schatte* v. *International Alliance*, 182 F. 2d 158 (9th Cir. 1950); *Lankford* v. *International Bhd. of Elec. Workers*, 196 F. Supp. 661 (N.D. Ala. 1960).

[21] *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959) (nonfederal conspiracy claim supported by federal secondary boycott claim); *Flame Coal Co.* v. *United Mine Workers*, 303 F.2d 39, 42 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); *United Mine Workers* v. *Osborne Mining Co.*, 279 F.2d 716, 724 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960); *cf. Wertanen* v. *Welduction Corp.*, 151 F. Supp. 440 (E.D. Mich. 1957).

CONCLUSION

For the above reasons we reverse the District Court's order dismissing the complaint without a hearing for lack of subject-matter jurisdiction. The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter. The nonfederal claims—wrongful discharge and conspiracy—may also be entertained under the doctrine of pendent jurisdiction. Accordingly, we remand the case for further proceedings consistent with this opinion.

Reversed and remanded

Judgment

Filed and Entered, March 2, 1964.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH,
Appellant,

vs.

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from *the United States District Court for the* - - Southern - - - *District of* - - - West Virginia.

This cause *came on to be heard on the record from the United States District Court for the* - - - Southern - - - *District of* - - - West Virginia - - - - - - - - - - - - , *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

HERBERT S. BOREMAN
United States Circuit Judge.

EDWARD S. NORTHROP
United States District Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA,
and UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

FILED
May 1, 1964

ON THE PETITIONS FOR REHEARING

PER CURIAM:

In their Petitions for Rehearing the appellees call attention to a factual inaccuracy in the opinion which, though legally insignificant, bears correction. According to the original complaint Rumbaugh approached an agent of the company on or about July 16, 1959, with an inquiry about his rights under the Railway Labor Act, not a "union

agent" as we recited initially. The misstatement has been corrected. That the union is the primary object of Rumbaugh's grievances appears convincingly in other portions of the complaint. The reasoning and result of our decision remain unaltered.

The core of appellees' petitions for rehearing is the court's consideration sua sponte of the doctrine of pendent jurisdiction, which was not discussed in the briefs and oral arguments. Failure of the appellees to present this point before this time is no ground for a rehearing.

The fundamental question on the appeal is the propriety of the District Court's dismissal of the suit for lack of subject-matter jurisdiction. We concluded that there was original jurisdiction of the claim for breach of the duty of fair representation and, further, that there was ancillary jurisdiction of the remaining claims. This result is not inconsistent with the line of cases fostered by *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824), and discussed in *Hurn* v. *Oursler*, 289 U.S. 238 (1933). It goes without saying that a court has jurisdiction to determine its own jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 292 n.57 (1947); Wright, *Federal Courts*. 44-47 (1963 ed.). Furthermore, the reasons assigned by the Railroad opposing application of the doctrine of pendent jurisdiction are all dealt with in the opinion and need no further elaboration. The additional cases cited in the petition of the union are either not in point, or cumulative, or distinguishable.

As to the union's contention that under West Virginia law there can be no cause of action for conspiracy against an unincorporated labor union, we need only say that this contention, if it has merit, may be raised as an affirmative defense on remand. It does not, however, undermine the ancillary federal jurisdiction which attaches to the non-federal claim. Other defenses which the union has as yet not asserted may also be raised in the District Court. Such

defenses as lack of venue, want of legal service and failure to state a claim upon which relief can be granted, which were not considered by the District Court, we, of course, decline to pass upon.

The Petitions for Rehearing are denied.

Filed May 1, 1964

No. 9022.

Order

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.

This Court having on March 2, 1964, rendered its decision reversing the judgment of the District Court appealed from in the above-entitled case, and the appellees having on April 1, 1964, filed petitions for rehearing en banc, and the petitions having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby denied.

May 1, 1964.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH,
Appellant,

v.

WINIFREDE RAILROAD COMPANY, CARBON FUEL COMPANY, LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court For the Southern District of West Virginia, at Charleston.

APPELLEES' (UNIONS') PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Fourth Circuit:

Petitioners (Appellees Local Union 14182 United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America),[1] and each of them, respectfully petition this Honorable Court

[1] Local Union 14182 United Mine Workers of America is called "Local" herein; District 50 United Mine Workers of America, "District 50"; and United Mine Workers of America, "UMW". Collectively, they are referred to as "Unions".

for a rehearing of the captioned cause No. 9022 and to set aside the judgment and opinion filed and rendered in said cause on March 2, 1964, by a panel consisting of Chief Judge Sobeloff, Circuit Judge Boreman and District Judge Northrop and in support of this Petition represent unto the Court:

In a damage action brought against Winifrede Railroad Company, Carbon Fuel Company and Unions, the district court dismissed the complaint on the ground that "plaintiff's allegations . . . are nothing more than a complaint for an unlawful discharge from his employment or a conspiracy upon the part of the defendants to commit a common law tort against the plaintiff" and "Jurisdiction of these causes of action cannot be entertained by this Court in the absence of diversity of citizenship between the parties" (P.A. 42).[2]

Although the complaint charged that plaintiff's dispute whether he was a member of the collective bargaining unit in an agreement covering Railroad's non-supervisory personnel originated with Railroad and Carbon prior to any union action, the opinion (Op. 2)[3] posed the jurisdictional issue, "is there federal court jurisdiction over an employee's suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit which the union is statutorily obligated to represent?" Answering the issue posed and reversing the district court because of its failure to hold a hearing on Rumbaugh's employment status (Op. 16, 19), the opinion holds, contrary to Unions' contentions, that the "Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment" (Op. 12), that the Adjustment Board

[2] "P.A." refers to the Appendix to Appellant's brief. "U.A. . . . a" refers to Appendix A of Unions' brief.

[3] The abbreviation "Op." refers to the Court's Slip Opinion filed in this case. Unless otherwise indicated, all emphases are supplied.

was not "the proper forum for this case" (Op. 16), that "The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter" (Op. 19) and that upon examining the facts, should the district court find Rumbaugh not a supervisor, then the action for invidious discrimination should be heard on the merits, but should the finding be he was a supervisor, then a dismissal motion could then properly be entertained (Op. 16).

The opinion also holds that "The nonfederal claims—wrongful discharge and conspiracy—may also be entertained under the doctrine of pendent jurisdiction. It remands the case "for further proceedings consistent with" its said opinion (Op. 19-20).

Without waiving any contentions advanced by Unions in their dismissal motions (U.A. 5-7a), in briefs filed and in oral argument and expressly reserving them, Unions address themselves primarily to those features of the opinion wherein it is believed the Court has based its opinion and judgment upon both erroneous recitals, which are inconsistent with the complaint's allegations, and incorrect and inapposite legal principles.

I. THE AUTHORITY AND JURISDICTION HEREIN GRANTED THE DISTRICT COURT AND THE REFUSAL TO APPLY PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT RESULT FROM INACCURATE RECITALS IN THE OPINION WHICH VARY FROM CRUCIAL ALLEGATIONS IN THE COMPLAINT. THE OPINION AND JUDGMENT ARE CONTRARY TO FEDERAL DECISIONS AND TO NATIONAL LABOR POLICY.

A basic error in the Court's opinion is its recital that plaintiff's dispute originated with Unions; but, Rumbaugh's *employment-status dispute whether he was an employee under the collective bargaining unit initiated with Railroad and Carbon,* according to the complaint's allegations (P.A. 28-29, paragraph 5, Complaint) *and this*

was prior to any contact Rumbaugh charges he had with any union agent (P.A. 29).

The *opinion's recital* (Op. 4) that Rumbaugh was "briskly informed" *by the union agent* he had no right to organize other employees *is totally disconsonant* with the *complaint's allegations* which aver "complainant was briskly informed *by the officers of the railroad and Carbon* . . . he had no rights under the Railway Labor Act" (P.A. 29), that he was thereafter assured by Railroad's president of an investigation, and only thereafter "Complainant inquired of Hunter the agent and representative of the defendant unions as to his rights under the Railway Labor Act" (P.A. 29).

Though the opinion (Op. 8) points to Rumbaugh's allegations which are described as establishing "his non-supervisory status", it carefully *avoids the decisive allegations* that Railroad and Carbon avowed he had no rights under the Railway Labor Act and that he was a supervisory employee. Thus, the complaint's allegations themselves posed the inquiry whether Rumbaugh was a supervisory or non-supervisory employee; the collective agreement's bargaining unit covered only non-supervisory personnel; and the basic dispute between Rumbaugh and his employer concerned Rumbaugh's status as an employee under the collective agreement.

The opinion's variance of factual recitals from the complaint's allegations has led the Court into error of law. Throughout Unions' brief it was stressed that federal cases establishing and implementing a union's duty of fair representation made clear *such duty was owing only to those employees within the bargaining unit of employees for whom the union has undertaken to act.* See Unions' brief, pp. 11-14. The opinion (Op. 6) concedes this and admits that "an employee must establish, as part of his case, that he is a member of the designated

bargaining unit. The opinion commits fundamental error when it restricts Rumbaugh's disputed status to Unions (Op. 7). *That is not the situation alleged in the complaint.* The Court's opinion falls into the basic fallacy of assuming Rumbaugh is a member of the bargaining unit; and though tacitly admitting he is not in its remand of the case to the district court to determine whether or not he is, the opinion contrariwise assumes he is in holding "The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter" (Op. 19).

But, to achieve this result, the opinion recitals are not those of the complaint. Though the opinion admits the "plain meaning" of 45 USCA 153 First (i) "is that the *Board* is charged with responsibility of adjudicating controversies *between employees and their employer*", it ignores totally those allegations showing the situation herein is precisely geared to the statute's purview.

In cases cited in footnote 7 (Op. 11) employees were concededly employees in the bargaining unit. Notably, in one *BRT* v. *Howard*, 343 U.S. 768 (1952), involving the contract's *validity*, it was observed (p. 774) "The claims cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board." *Pelter* v. *Southern Pacific Co.*, 359 U.S. 326, 327 fn. 3, observes too the case involves "no question" of contract interpretation or application but "*validity under the statute.*"

A fundamental error of the opinion herein lies in its failure to differentiate between the instant situation involving the interpretation and application of the collective agreement (exclusive jurisdiction for which Congress vested in the Adjustment Board) and those cases which concerned a labor agreement's *validity*, such as *Howard*,

Graham, Steele, Tunstall and Conley,[4] and those concerning "statutory interpretation" such as *Cunningham* v. *Erie Rr. Co.*, 2 Cir., 266 F. 2d 411, 414 (1959).[5]

The opinion's grant of jurisdiction to the district court in the instant case and its rejection of National Railroad Adjustment Board's jurisdiction collides with *Slocum* v. *Delaware, etc. Rr. Co.*, 339 U.S. 239 (1950) [discussed *post*, p. 8] and with opinions of the Third and Fifth Circuits, namely, *Britton* v. *Atlantic Coast Line R. Co. et al.*, 5 Cir., 303 F. 2d 274 (1962)[6] and *Roberts* v. *Lehigh & New England Ry. Co.*, 3 Cir., 323 F. 2d 219, 222 (1963), holding:

> "A Federal district court has jurisdiction to determine the validity of a contract under the guarantees of the Act. On the other hand, *if the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation.*"

Though *Britton* and *Roberts* (as a district court case, DC, E.D. Pa., 1962, 211 F. Supp. 379) were brought to the Court's attention (Unions' Br. 21-22), the opinion refers to neither. The opinion is similarly silent as to *Hester* v.

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[4] *Graham* v. *Bro. of Loc. Firemen*, 338 U.S. 232 (1949); *Steele* v. *Louisville & Nashville Rr. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Bro. of Locomotive Firemen*, 323 U.S. 210 (1944); and *Conley* v. *Gibson*, 355 U.S. 41 (1957). In *Howard* (343 U.S. 774), the Supreme Court noted, "This dispute involves the *validity* of the contract, *not its meaning.*"

[5] Indeed, Circuit Judge Medina who wrote the opinion in *Cunningham* made it clear in a later case [*Latham* v. *B&O Rr. Co. et al*, 2 Cir., 274 F. 2d 507, 511 (1960)] that "Thus *Cunningham* presented a question of *statutory interpretation* and so is the issue now before us in this case a question of statutory interpretation."

[6] The opinion cites *Britton* on p. 11, fn. 7 as supportive authority that 45 USCA 153 First (i) is not available in an employee-union dispute; but the opinion ignores the Fifth Circuit's language that "this was really a suit on, and a controversy over, the interpretation of the collective bargaining agreement" (303 F. 2d 275). It ignored also the fact that the Fifth Circuit affirmed the district court's dismissal on the ground that exclusive jurisdiction was in the Adjustment Board.

BRT, 8 Cir., 206 F. 2d 279 (1953), holding federal court jurisdiction unavailable in a damage action against a labor union in the absence of the establishment of the *claimed* and *disputed craft status* by the agency to which Congress delegated the exclusive authority.

The opinion (Op. 5) patently misconceives the district court's reasoning in the opinion's statement that the conclusion below was premised upon *Alabaugh* v. *B&O R.R.*, 4 Cir., 222 F. 2d 861, cert. den. 350 U.S. 839 (1955)[1] rather than *Thompson* v. *Bro. of Sleeping Car Porters*, 4 Cir., 316 F. 2d 191 (1963), and it inaccurately attributes to the district court that "it declined to give weight to what it recognized to be 'the current of judicial authority'." What the opinion significantly overlooks is the district court's distinguishment (P.A. 40-41) between that "current authority" and the instant case, correctly rejecting *Cunningham* where, as here, the controversy is "between an employee or his union vis-a-vis the railroad." *Cunningham's* inapplicability is made certain when it is considered that therein "the thrust of the plaintiff's case was directed primarily, if not exclusively, against his Union representative, and the position of the Railroad in the pattern of litigation was merely incidental by reason of the collective bargaining agreement" (P.A. 41). This is wholly dissimilar to the present situation where the dispute concerning Rumbaugh's status under the contract arose between him and Railroad and Carbon. Moreover, the inapplicability of both *Cunningham* and *Thompson* is evident from the fact that in both membership in the bargaining units was a conceded fact.

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[1] Rumbaugh believed *Alabaugh* to have been correctly decided since his brief (p. 16) expressed it "turned on contract interpretation". While Unions argued (Br. 20) that the instant case did not concern the issue whether *Steele's* doctrine extends beyond racial discrimination, it is pertinent that the vitality of this Court's *Alabaugh* was recognized by the Fifth Circuit in *Int. Assn. of Machinists* v. *Eastern Airlines, Inc.*, 5 Cir., 320 F. 2d 451, 453 (1963), citing *Alabaugh* and stating: "The fact that the matters complained of are alleged to constitute violations of the Act as well as violations of the agreement does not oust the Adjustment Board of its exclusive jurisdiction."

The opinion's statement (Op. 14) that Rumbaugh's sole forum for relief is in a federal court overlooks that in his dispute with Railroad, Rumbaugh had the right under 45 USCA 153 First (i) to initiate a proceeding before the Adjustment Board; he had no right to resort to another forum for interpreting and applying the labor agreement in the matter of his status in the bargaining unit. *Bro. of Locomotive Engrs.* v. *L&N Rr. Co.*, 10 L. ed. 2d 172, 176. As the Eighth Circuit stated in *Hester* v. *BRT*, 206 F. 2d 279, 282, until the federal agency to which Congress gave exclusive authority to determine Rumbaugh's disputed employment status, he is "without any foundation . . . for legally sustaining the critical allegation on which (his) suit is attempted to be rested." This is consistent with *Slocum* v. *Delaware, etc. Rr. Co.*, 339 U.S. 239 (1950) that as long as the Adjustment Board has not acted, a federal court has no power to adjudicate a dispute *involving the interpretation of collective labor agreements* because of the exclusive jurisdiction conferred by Congress upon the Board. The opinion herein (Op. 11, fn. 7) points to *Slocum's* language that therein there was no conflict in employee-unions' interest; but Unions submit this overlooks that the employment-status dispute arose and existed between Railroad and Rumbaugh. *The opinion and judgment violate Slocum's rule.*

The opinion's recital (Op. 10) that federal courts are not ousted from their function of interpreting collective agreements is not supported by cases cited in footnote 10. Without attempting to capsulate the cases' facts, it suffices to point out that the citations deal with statutory interpretations of the Railway Labor Act concerning dues deductions, or whether an agreement therefor is valid, or whether federal court jurisdiction is available to compel good faith bargaining by a railroad with a bargaining representative certified by a federal agency. None of them dealt with an employment-status dispute between an employee and a carrier employer which brought the con-

tract's interpretation and application squarely within the Adjustment Board's jurisdiction.

Conley v. *Gibson*, 355 U.S. 41, 44-45 (1957), cited as supportive authority (Op. 11-12), notes "*This case involves no dispute between employee and employer*" and, further, "the contract . . . will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent." So, too, nothing in this Court's *Thompson case* (316 F. 2d 191, 199) supports federal jurisdiction *under the circumstances alleged in Rumbaugh's complaint*. Further, it requires only a cursory reading of the complaint to see how inaccurate is the opinion's further statement that "Rumbaugh has joined the railroad to his discrimination charge *only because* he is claiming that, in consequence of its active participation in the union's discriminatory conduct, he was unlawfully discharged" (Op. 13). Its reliance upon *Cunningham* is equally erroneous, since, as noted (ante, p. 6), *Cunningham's* concern was *not* interpretation of a contract *but "a question of statutory interpretation"* and of the *agreement's validity* (266 F. 2d 414, 416).

Nor is *Priest* v. *Chicago, R.I. & P.R.R.*, 8 Cir., 189 F. 2d 813 (1951) authority for the Court's grant of jurisdiction to the district court to determine whether Rumbaugh is within the bargaining unit. Priest's involvement was whether Priest had been discharged so as to permit *a common-law action* for breach of contract authorized under *Moore* v. *Illinois Central Rr. Co.*, 312 U.S. 630 (1941), diversity of citizenship existing, or whether he had been furloughed in which event "the controversy" would involve "only the interpretation and application of the collective-bargaining agreement" (p. 815); but nothing in *Priest* permitted the district court jurisdiction to interpret or apply that agreement. Furthermore, the Eighth Circuit's *subsequent Hester case* militates against the interpretation placed upon *Priest* herein.

Nor do cases cited in the opinion's footnote 6 (Op. 9) support the remand to permit the district court's determining Rumbaugh's status. Indeed, two of them challenge the opinion's action. In *BRT* v. *Central of Ga. Ry. Co.*, 5 Cir., 305 F. 2d 605 (1962), it was held that an employee's status "was a matter beyond the jurisdiction of the Court" (p. 607); its remand dealt with the issue of whether the railroad was violating the Railway Labor Act "by wrongfully destroying the effectiveness of the chosen representative" (pp. 608-9). In *Koelker* v. *B & O Rr. Co.*, DC, E.D. Pa., 1956, 140 F. Supp. 887, an employee sought damages for salary lost as a result of being laid off and for punitive damages; the district court held that "Since there is a dispute over the interpretation of the Board's award it will be necessary for one of the parties to request an interpretation from the Board . . ." (p. 890). The third case, *Hawn* v. *American* S.S. Co., DC, W.D. N.Y., 1939, 26 F. Supp. 428, was a negligence action and did not involve a dispute which Congress had committed to a federal agency.

The Opinion And Judgment Are Totally Inconsonant With National Labor Policy

National labor policy has firmly established that when a matter is even "arguably" subject to a labor statute, federal courts must defer to the exclusive competence of the administrative agency chosen by Congress to deal with the matter. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The same policy was applied in *Pennsylvania Rr. Co.* v. *Day*, 360 U.S. 548 (1959) wherein the Supreme Court professed, in directing dismissal by the district court, that "*not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act*" (p. 554). Though Unions' brief (pp. 15-17) directed the Court's attention to the *Day* and other cases characterizing Board procedures as "compulsory" (*California* v. *Taylor*, 353 U.S. 553, 558-9 and as a

"*mandatory, exclusive, and comprehensive* system for resolving grievance disputes" (*Bro. of Locomotive Engrs. v. L & N Rr. Co.*, 10 L. ed. 2d 176 (1963), the opinion herein contained no response. Since the admitted problem is whether Rumbaugh acted in a supervisory or non-supervisory capacity so as to bring him within the ambit of the bargaining unit established in the collective bargaining unit, it is appropriate to note the recent *Local No 207, Iron Workers Union* v. *Perko*, 10 L. ed 2d 646, statement that "It is evident that this case presents difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole'."

II. THE COURT'S OPINION ERRONEOUSLY ACCORDS THE DISTRICT COURT JURISDICTION OVER A NONFEDERAL, COMMON-LAW TORT CLAIM, SINCE THE STATE IN WHICH THE TORT ALLEGEDLY AROSE AND IN WHICH THE DISTRICT COURT IS SITTING DOES NOT PERMIT SUCH SUIT AGAINST UNINCORPORATED LABOR UNIONS.

Having first held "the Adjustment Board does not have exclusive, or even concurrent, jurisdiction" over Rumbaugh's action against the Unions for breach of the duty of fair representation (Op. 12), the Fourth Circuit then holds the doctrine of pendent jurisdiction warrants the district court's trial of the non-federal, common-law action of tort based upon the alleged conspiracy (Op. 19-20). What the Court's opinion overlooks is that *public policy* in West Virginia, wherein the alleged conspiracy allegedly occurred, expressed in the State Constitution, state legislation and decisional law by the Supreme Court of Appeals of that state, makes crystal clear such an action may not be maintained nor a judgment entered against Unions for a common-law tort in any state court.

There is in West Virginia now, and has been since 1872, a constitutional command to the judiciary that "Such parts of the common law, and of the laws of this State as are

in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature . . ." Constitution of West Virginia, Article VIII, Section 21. Legislation consistent with the constitutional command is found in W. Va. Code 1931, as amended, Chapter 2-1-1. Recognizing such constitutional restriction, the Supreme Court of Appeals of West Virginia has repeatedly rejected common-law actions against unincorporated associations, including unincorporated labor unions.

In cases involving unincorporated associations, the West Virginia Supreme Court has noted its lack of disposition to encroach upon legislative powers, and refused to open the way to subject unincorporated associations to liability in the absence of permissive state legislation.

As to unincorporated labor unions, in an action for damages for an alleged conspiracy, the West Virginia court, in *Milam* v. *Settle*, 127 W. Va. 271, 32 S. E. 2d 269 (1944), reiterated its previously expressed rule that, absent a statute authorizing suit, an unincorporated society or association cannot be sued as an entity by its name, nor can a judgment be rendered against it merely by name. See also *West* v. *Baltimore and Ohio Railroad Company*, 103 W. Va. 417, 137 S. E. 654; *Simpson and Smith* v. *Grand International Bro., etc.*, 83 W. Va. 355, 98 S. E. 580. In *Milam* v. *Settle* (32 S. E. 2d 272), the Court declared, "How can it be said that service on members of an unincorporated association brings it into the action in any way, *when the court is powerless to render any judgment against it?*" In that case, too, the Supreme Court is positive in its profession that in West Virginia liability against an unincorporated labor organization is nonexistent. It said (32 S. E. 2d 275):

> "On the whole, not only has the Legislature of this State failed to enact any statute, which by direct terms, or through implication, authorizes suits and

actions against unincorporated associations by name, *but it has, in our opinion, deliberately molded our laws so as to prevent suits or actions in any form against that class of unincorporated associations known as labor unions.*"

While Rule 17(b), Federal Rules of Civil Procedure, authorizes a suit against an unincorporated association, it provides for such suit "for the purpose of enforcing for or against it *a substantive right existing under the Constitution and laws of the United States.*" It is thus clear that under Rule 17(b), a nonfederal, common-law tort action against unions may not be maintained. Even where a jurisdiction outside of West Virginia permitted suit to be brought against labor organizations as entities—which is not true in West Virginia—implementation of the rule of *Milam* v. *Settle* in such jurisdiction for alleged wrongful conduct allegedly occurring in West Virginia resulted in the court's dismissing an action for damages, *Barlow* v. *Roche*, 161 A. 2d 58 (Mun. Ct. of App., D.C., 1960).

Thus, under West Virginia law and Rule 17(b), suit could not be maintained against defendant Unions for a common-law tort, nor would the district court have jurisdiction, power and authority to enter any judgment against the Unions, or either of them. This Court's error is emphasized by the United States Supreme Court's declaration in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-9 (1945), where it stated:

> "*But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State . . .*"

In *York*, the Supreme Court emphasized that the "nub of the policy" of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, "is that for the same transaction the accident of a suit . . .

in a federal court instead of in a State court a block away should not lead to a substantially different result" (p. 109).

The opinion's result stands challenged by the cases discussed.* This would be true even if diversity existed, although admittedly it does not exist herein.

III. PENDENT JURISDICTION WAS NEITHER RAISED NOR ARGUED IN EITHER THE DISTRICT COURT OR IN THIS COURT. IT WAS REJECTED BY A FORMER DECISION OF THIS COURT. ITS IMPORTANCE REQUIRES THE ISSUE BE SET FOR ARGUMENT EITHER IN THIS COURT OR UPON REMAND TO THE DISTRICT COURT.

Unions' Motions to Dismiss, found in Unions' Appendix (pp. 5-7a), challenged the district court's power, authority and jurisdiction to hear and determine nonfederal, common-law torts alleged or to enter any judgment against either of them because West Virginia, where the alleged wrongful conduct allegedly occurred, did not recognize unincorporated labor unions as jural entities. *The district court did not reach this issue,* having dismissed the complaint on the ground that "A distillation of the complaint for an unlawful discharge . . . or a conspiracy . . . to commit a common law tort" which could not be entertained because of the lack of diversity of citizenship (P.A. 42).

It was never suggested either in the district court or in this Court that the nonfederal, common-law action of tort could attach to the federal cause of action so as to vest the district court with jurisdiction over such non-federal cause of action. The permissive jurisdiction accorded the district court herein to try the nonfederal claims of wrongful discharge and conspiracy, not only has deprived Unions of their day in court as to this crucial jurisdictional issue,

*While the second question posed in the opinion (Op. 2) is, "does an employee have such a federal claim against his *employer* for wrongful discharge that jurisdiction will lie in a federal court regardless of the citizenship of the parties?", and *does not include Unions*, the fact that in footnotes 1 (Op. 3) and 21 (Op. 19) cases against UMWA are cited, it is assumed that discussion of pendent jurisdiction is intended to apply to Unions. Clarification at least is required.

but it collides with this Court's action in *UMWA v. Patton*, 4 Cir., 211 F. 2d 742 (1954), wherein plaintiffs having sued upon a federal right asserted they were enfitled to punitive damages because of a "common law tort'" but this Court rejected the contention, saying (p. 748): "*There is no diversity of citizenship and the plaintiffs are entitled to invoke the jurisdiction* of the federal courts only because they sue on a cause of action created by a federal statute . . ."

The opinion's citation (Op. 19, fn. 21) of *UMWA* v. *Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U.S. 1013, *UMWA* v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, 724, cert. den. 364 U.S. 881, and *Wertanen* v. *Welduction Corp.*, DC, E.D. Mich., 1957, 151 F. Supp. 440 conflicts with this Court's *Patton* and do not support this Court's warrant of pendent jurisdiction. None dealt with the crucial inquiry whether pendent jurisdiction applied where, as herein, the state in which the alleged wrongful acts were asserted to have occurred, namely, West Virginia, would not have permitted unincorporated labor unions to be sued or judgments to be taken against them.

Though the issue arose in *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, 42, the Sixth Circuit erroneously justified it on the ground that "under Rule 17(b) F.R. Civ. P. defendant, an unincorporated association, is made suable as such and in the federal court may be made to respond in damages for its tortious conduct", although Rule 17(b) (1) is specific that it authorizes a labor union to be made a party "for the purpose of enforcing for or against [an

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*In *Patton*, plaintiffs relied, in their Fourth Circuit brief (p. 34) upon the doctrine of pendent jurisdiction, citing *Hurn* v. *Oursler*, 289 U.S. 238 (1933), arguing that "the evidence is such to establish not only secondary boycott as made unlawful by the Taft-Hartley law but also the common law tort of interference with the contract right . . . In such a case where the federal question, to-wit, the secondary boycott under the Taft-Hartley Act, is not plainly wanting in substance, the federal court, . . . may nevertheless retain and dispose of the case upon the non-federal ground". This contention appears too in *Patton* as reported in 47 ALR 2d 850, 855.

unincorporated association] *a substantive right existing under the Constitution or laws of the United States*"—not to enforce a state common-law action. Further error in the Sixth Circuit's holding is manifest from Rule 82, Federal Rules of Civil Procedure, stating "*These rules shall not be construed to extend . . . the jurisdiction of the United States district court.*"[16]

Moreover, since *Hurn's* rationale is predicated upon the thesis that both federal and nonfederal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (*Hurn*, 289 U.S. 426), the assertion of jurisdiction of the nonfederal claim must necessarily collide with the doctrine of federal preemption, for if the nonfederal claim be supported by evidence reflecting violation of the federal right, then Congress has occupied the field of the type of conduct involved and it thereby foreclosed state court jurisdiction to entertain a common-law tort action for damages based thereon. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173; *Sherlock* v. *Alling*, 93 U.S. 99, 104.

It is a general rule that a case reversed on appeal should be remanded to the district court for consideration of an issue left undecided. *Leedom* v. *Int. Bro. of Elec. Workers*, 7 Cir., 278 F. 2d 237 (1960). The rule is particularly applicable where so important an issue of jurisdiction is left undecided, and the significance of such issue is accentuated where, as has been shown, West Virginia state courts would not be authorized to hear and determine the nonfederal, common-law claims. Should the Court not include this issue in its remand, certainly it should at the very least hear arguments itself on the issue of pendent jurisdiction *under the circumstances posed by the instant complaint.*

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[16]Though certiorari was denied in *Flame* (371 U.S. 891), such denial imports no expression upon the merits of a case. *Polites* v. *U.S.*, 364 U.S. 426, 433, fn. 9; *Parker* v. *Ellis*, 362 U.S. 574, 576.

IV. IF REMANDED, OTHER UNDECIDED ISSUES POSED IN THE DISMISSAL MOTIONS SHOULD BE HEARD; AND UNIONS SHOULD BE PERMITTED TO FILE ANSWERS

Also left undecided, as posed in Union's dismissal motions (U.A. 5-7a), were Unions' challenges of the district court's venue; of its jurisdiction over District 50 and UMW due to want of legal service upon them; and of the complaint's failure to state a cause upon which relief could be granted, particularly as to UMW which is not signatory to the collective agreement and could not have owed Rumbaugh any duty of fair representation and undisputed affidavits show no agency relationship so as to impose liability in any event upon UMW.

That there is merit in these contentions is manifest from the following discussions:

(1) 28 USCA 1391(b) provides:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

That not all defendants reside within the judicial district of the Southern District of West Virginia is made abundantly clear by the rule expressed in *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham*, DC Cir., 175 F. 2d 802, that an unincorporated association is an "inhabitant" for venue purposes *only in the district in which such association has its principal place of business* located. See *Graham* v. *Bro. of Loc. Firemen*, 338 U.S. 232, 235-6 (1949); also *McNutt* v. *United Gas, Coke and Chemical Workers of America, CIO, DC, Ark.*, 1952, 108 F. Supp. 871; *Cherico* v. *BRT*, DC, S.D. N.Y., 1958, 167 F. Supp. 635. The record establishes that the respective principal places of business of UMW and District 50 are in Washington, D. C. (U.A. 8-9a).

(2) The returns of service of process issued in this case show service was had "upon the within named District 50" and UMW by delivering a true copy thereof to "Edward Hunter, field representative of District 50 and agent of" UMW. While Hunter is employed by District 50, he is not an agent of UMW nor of District 50 so as to effectuate legal service upon either UMW or District 50.

Unions pressed upon the district court that undisputed affidavit statements[1] showed that service upon Hunter did not meet the service requirements of Rule 4(d) (3) and (7), Federal Rules, so as to confer upon the district court jurisdiction of either UMW or District 50.

The inapplicability of *Int. Bro. of Teamsters* v. *U.S.*, 4 Cir., 275 F. 2d 610 and the applicability of *Carpenters District Council* v. *NLRB*, DC, E.D. Mich., 1960, 46 LRRM 2887, *Isbrandtsen Co., Inc.* v. *National Marine Engineers' Beneficial Ass'n.*, DC, S.D., N.Y., 1949, 9 F.R.D. 541, *Morgan Drive Away, Inc.* v. *Int. Bro. of Teamsters*, 7 Cir., 268 F. 2d 871 (1959), and *Farnsworth & Chambers Co., Inc.* v. *Sheet Metal Workers etc.*, DC, New Mexico, 1954, 125 F. Supp. 830, were presented to the district court. In the absence of valid service, due process under the Fifth and Fourteenth Amendments to the Federal Constitution is denied the two Unions.

(3) The record establishes UMW was not a signatory to the collective agreement involved herein; it therefore owed no duty as a collective bargaining agent of employees covered by the contract. *Cf. Hamilton Foundry etc. Co.* v. *Int. M. & F. Workers Union*, 6 Cir., 193 F. 2d 209, 215. This fact plus undisputed affidavit statements established the total lack of any agency relationship between UMW and Hunter who is the only union agent mentioned in the complaint. These matters were presented in Union's brief in the district court, but as already indicated, the district court did not reach this issue.

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[1] These affidavits appear in full in the record in the Clerk's office.

Clearly, Unions are entitled to be heard on these issues, and the Court's opinion should direct the district court, if the case is remanded, to consider such matters.

Further, Rule 12(a), Federal Rules of Civil Procedure, accords Unions the right to file an answer upon denial of its dismissal motions. The opinion should, but does not, recognize this right.

CONCLUSION—Prayer

It is respectfully submitted that the district court correctly dismissed the action as Unions contended in their brief and that the Court's opinion and judgment complained of herein are clearly in error and should be reconsidered upon the rehearing sought herein; that the importance of jurisdictional and other issues presented warrants the request that argument on rehearing be heard before the entire Court *en banc*, particularly in view of the panel's disagreement with *Alabaugh* v. *B & O Rr. Co.*, 4 Cir., 222 F. 2d 861 (1955), cert. den. 350 U.S. 839; and that such opinion and judgment should be set aside and reversed and the district court's judgment affirmed, or, should the case be remanded that the Court will direct that pending issues be determined and Unions be accorded such other relief as they may be entitled to.

Respectfully submitted,

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Attorney for Appellees (Petitioners):
Local Union 14182 United Mine Workers of America
District 50 United Mine Workers of America, and
United Mine Workers of America

April 1, 1964

CERTIFICATE

The foregoing Petition is presented in good faith and not for the purpose of delay.

M. E. BOIARSKY
Attorney for Appellees (Petitioners)

APPENDIX E

COMPLAINT

1. Jurisdiction of the United States District Court for the Southern District of West Virginia is based on The Railway Labor Act (45 U S C sec 151 et seq) and 28 U S C sec 1331, & 1337, and Taft Hartley Act (29 U S C sec 141-168) and 29 U S C 101-115, and Interstate Commerce Act 49 U S C sec 1 et seq.

2. The complainant, Luther Ray Rumbaugh, is a resident of Winifrede, West Virginia where he had been employed for over 30 years by the Winifrede Railroad Company, herein referred to as Railroad prior to his unlawful and discriminatory discharge on October 15, 1959. Carbon Fuel Company is the owner and operator of Winifrede Railroad Company and is herein referred to as Carbon. Local Union 14182 etc. hereinafter referred to as Local is an agent and instrumentality of United Mine Workers of America, and District 50 etc. herein referred to as District 50 is similarly an agent and instrumentality of the United Mine Workers of America. Said Local, District 50, and United Mine Workers of America are labor unions or associations and are claimed to have committed a tort against the complainant within the Southern District of West Virginia and the same being contrary to federal law and liability is asserted against them individually and jointly as labor unions and associations. Carbon is jointly and separately liable along with the unions as a joint tort feasor for unlawfully destroying and in a discriminatory manner by unlawful means securing the discharge of the complainant from his employment with the *Winifrede Railroad Company. Carbon and the unions are charged with acting maliciously and in bad faith toward the complainant with the intent of destroying his employment and all the property rights and seniority rights thereto pertaining.* The United Mine Workers of America did commit the said tort through

the actions of its field representative Hunter and through the District 50 and the Local. As a direct and proximate result of the tort committed as aforesaid the complainant was discharged from his employment.

3. *Defendant Winifrede Railroad Company is a common carrier subject to the Interstate Commerce Act and is engaged in interstate commerce.* Complainant was at the time of his *discharge an employee of a common carrier within the meaning of the Railway Labor Act* and entitled to the benefits provided in said act. The railroad did discharge the complainant contrary to said law and contrary to other laws of Congress. After performing forty hours of work per week for the Railroad the complainant did also over a period of years work extra for Carbon Fuel Company and was paid by said company, but not at the time and a half rate the said scheme being used by the Company to avoid the Wage & Hour law. Defendant Carbon did violate the Taft Hartley law in procuring the discharge of the complainant and did permit a tort under federal law in so acting, for violating this and other acts of Congress herein set out.

All of the defendants did conspire together to commit the unlawful act of securing the complainant's discharge by unlawful means and in discriminating *against him in bad faith* and discharging him from his employment.

4. Complainant began his employment with the Railroad prior to 1928 as a laborer and worked continuously for the railroad from 1930 until his unlawful discharge on October 15, 1959 when he had worked up to the senior mechanic repairing, servicing and inspecting locomotives. He was treated as a railroad employee by the company in that deductions were made for the Railroad Retirement Board from complainant's salary yet the company did deny to him his rights under the Railway Labor Act. He was an hourly paid employee with no authority to hire fire or

discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports. Under date of October 20, 1958 the employees of the Railroad organized and selected District 50 United Mine Workers as their representative and a contract was entered into on behalf of Local 14182, copy hereto attached marked Exhibit A. This organization as well as all of the defendant unions have *not** been officially certified under the Taft Hartley Law as no non communist oath has been filed as required therein and none of the defendant unions have been certified by the board (National Labor Relations Board) so that there has been no legal determination that the complainant is a supervisor. Nevertheless the defendant unions have consistently refused membership to the complainant though he has frequently requested membership and this the unions have done in an arbitrary and discriminatory fashion with bad faith. At the same time the union did permit others to join though designated as shop foreman. The said agreement entered into between the Railroad and the Union is void and of no legal effect the same being executed and administered contrary to the Railway Labor Act.

5. Complainant worked in the shop with several other mechanics and on July 16, 1959 when a mechanic was off sick, another mechanic, Cooper, was next in line on seniority. Before he could take the job the defendant, Railroad and Carbon Fuel Company through its joint officer Ingrahm, did instruct one Calvert, Secretary and Treasurer of the local union to take the vacant job even though Calvert was not a mechanic, and Calvert did receive extra compensation over and above that which he had previously received. Complainant *inquired* of Ingrahm and *Morton immediately thereafter, as to the applicable rules for the operation of*

*Note: The italicized word "not" does not appear in the Appendix filed in the Fourth Circuit by Rumbaugh. However, it does appear in the original complaint, which is on file in the Clerk's office of the Fourth Circuit.

the shop under the Railway Labor Act and the *rights of the complainant and other employees therein to organize under the Railway Labor Act;* complainant was briskly informed by the officers of the railroad and Carbon above mentioned that he had no rights under the Railway Labor Act and that he should do as told by Mr. Ingrahm. At the same time rates of pay, rules and working conditions were being changed by the defendants contrary to the Railway Labor Act. Complainant went to Thomas, President of the Railroad and was assured of an investigation and hearing but the same was never given to him, all contrary to law. Complainant inquired of Hunter the agent and representative of the defendant unions as to his rights under the railway Labor Act and if the contract, rules, and working conditions had been filed with the National Mediation Board or elsewhere as required under the Railway Labor Act. This was on October 14, 1959 that he made inquiry of the union agent. On this day the said Hunter went to the management (Ingrahm & Morton) and filed charges against complainant on the false ground that he was discriminating against the union, and Hunter, Ingrahm and Morton collusively conspired then and there that complainant should be discharged and on the *next day, October 15, 1959,* complainant was informed by Ingrahm that he was discharged without any reason being given.

6. Complainant alleges and would show that the defendant unions had violated the law and did wish to deny to the complainant his rights under the Railway Labor Act and in order to injure and harm the complainant they did *unlawfully with bad faith discriminate against him by colluding with the defendant* railroad and Carbon to secure his discharge. The unions did in order to deny to complainant his rights under the law destroy his employment and seniority well knowing that the questions raised by complainant were proper and the unions did act with unlawful and malicious intent to destroy the complainant so that they would not have to accord to complainant his rights under the law. This they did maliciously and selfishly.

7. Plaintiff alleges and would show that there was no administrative remedy available to him as the Railroad did discharge him prior to the settlement of his dispute contrary to the agreements executed by the defendants and in addition the railroad did through its attorney on July 6, 1960 advise complainant that he had no rights under the agreements as he was a supervisory employee. As the defendant company recognized no agreement applicable to complainant it was a vain and fruitless thing for complainant to follow any administrative procedure set forth in the agreements executed by the parties. In addition the complainant alleges and would show that the said agreements were illegal and void as contrary to the Railway Labor Act. In addition under the law it was not necessary to follow any administrative procedure as complainant had decided to treat his discharge as final and sue the company for damages for wrongful discharge and to sue the union for unlawfully discriminating against him in procuring his discharge. He hereby makes his election to sue for damages and asks for no reemployment, to which he is entitled under laws set forth above.

8. The unlawfulness of defendant unions action is indicated by the following:

a. Did refuse to permit him to join the union and did actively with malicious intent seek to destroy his employment all contrary to the acts of Congress set forth.

b. Once on the properly the unions did unlawfully refuse to represent the complainant contrary to federal law.

c. Did file false, malicious and discriminatory charges against him and with the management.

d. Did act unlawfully without required certification under Taft Hartley Act and Railway Labor Act.

e. Did contrary to federal law interfere with complainant's right to bargain collectively with his employer under the Railway Labor Act, and the Taft Hartley Act.

The defendant, Carbon, did unlawfully join in the actions of the unions above set forth and did conspire with the unions to obtain the discharge of the complainant and the damage to his property rights. Complainant's work has always been satisfactory as evident by repeated raises one as recent as August 31, 1959.

9. The defendant Winifrede Railroad Company did unlawfully discharge the complainant for union activity contrary to the Railway Labor Act and laws above cited and did deny the complainant's right to organize, did attempt to influence complainant not to join a Railway Labor union by telling him he had no rights under the Railway Labor Act and by firing him for inquiring about his rights all of which was contrary to the Railway Labor Act. In addition the railroad did violate the Railway Labor Act by discharging complainant without just cause, without a hearing and investigation and opportunity to answer any charges against. The said discharge being discriminatory malicious, with bad faith and done with intent to harm and injure, all contrary to the acts of Congress above cited. The discriminatory and unlawful nature of railroad's action being indicated as follows:

a. Did favor union officials with choice assignments contrary to law and discharge complainant when the violations of law were called to company's attention.

b. Did manipulate and control the union so that the same was used to the detriment of employees and in a discriminatory fashion.

c. Did set up rates of pay, hours and working conditions contrary to acts of Congress known as Railway Labor Act and Adamson Act.

d. Did unlawfully consider complainant as supervisory employee as a pretense to deny him the rights of collective bargaining guaranteed to him by federal law cited in paragraph 1.

all of which when called to attention of Railroad and Carbon by the complainant did result in the discriminatory and unlawful discharge of complainant by defendant Railroad.

10. Wherefore complainant demands judgment against the defendants jointly and severally to-wit: Winifrede Railroad Company, Carbon Fuel Company (a corporation), Local 14182 United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America in the amount of $300,000 to cover compensatory damages of $150,000. and punitive damages of $150,000. Said compensatory damages being to compensate the complainant for the loss of employment and the benefits and emoluments thereto pertaining including but not limited to:

a. Right to continued employment until he reaches the age 65 for 15 years at the present average salary of $6000.

b. Right to pension to which he would be entitled at age 65 at an amount increased by additional accumulations from continued employment from his present age of 50.

c. Right to company pension and insurance benefits.

d. Seniority rights.

e. Diminution of earning capacity due to lack of employment outside of defendant's plant.

Wherefore judgment is demanded against the defendants jointly and severally in the amount of $300,000.

APPENDIX F

RAILWAY LABOR ACT

45 USCA

"§151. DEFINITIONS

"When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this chapter.

"Third. The term 'Mediation Board' means the National Mediation Board created by this chapter.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation desig-

nated either by a carrier or group of carriers or by its or their employees, to act for it or them.

"Seventh. The term 'district court' includes the United States District Court for the District of Columbia; and the term 'court of appeals' includes the United States Court of Appeals for the District of Columbia.

"This chapter may be cited as the 'Railway Labor Act.' May 20, 1926, c. 347, § 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, § 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921; Aug. 13, 1940, c. 664, §§ 2, 3, 54 Stat. 785, 786; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107."

"§151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."

"§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere

in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly desig-

nated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of

the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

CONSTITUTION OF WEST VIRGINIA.
ARTICLE VIII, SECTION 21:

"Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature . . ."

WEST VIRGINIA CODE, 1931, as amended, Chapter 2. Article 1, Section 1 (Michie's West Virginia Code of 1961. Annotated, Serial Section 22):

"Common Law.—The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State. (Code 1849, c. 16, § 1; Code 1860, c. 16, § 1; Const. 1863, art. 11, § 8; Code 1868, c. 13, § 5; Const. 1872 as amended 1879-1880, art. 8, § 21; 1882, c. 143, § 5; Code 1923, c. 13, § 5.)"

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IN THE

Supreme Court of The United States

October Term, 1964

No. 282 and No. 283

WINIFREDE RAILROAD COMPANY, a corporation, and THE CARBON FUEL COMPANY, a corporation,

Petitioners, (No. 282)

vs.

LUTHER RAY RUMBAUGH,

Respondent,

and

LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and UNITED MINE WORKERS OF AMERICA,

Petitioners, (No. 283)

vs.

LUTHER RAY RUMBAUGH,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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IN THE

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vs.

LUTHER RAY RUMBAUGH,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

TERMS OF REFERENCE AND PRELIMINARY STATEMENT

"Respondent"—Luther Ray Rumbaugh, plaintiff in the District Court, appellant in the Circuit Court, and is herein the respondent.

"Railroad"—Winifrede Railroad Company, a corporation, and The Carbon Fuel Company, a corpora-

tion, defendants in the District Court, appellees in the Circuit Court, and petitioners herein, and sometimes called "Employer."

"Unions"—Local Union 14182 United Mine Workers of America, District 50, United Mine Workers of America, and United Mine Workers of America, defendants in the District Court, appellees in the Circuit Court, and petitioners herein.

"Fourth Circuit"—Fourth Circuit Court of Appeals.

The case involves the sufficiency of the respondent's complaint to properly allege subject-matter jurisdiction in the Federal Court.

Inasmuch as the statement of the case, opinions below, jurisdiction, questions presented, and statutes involved are adequately set forth in the petitions of Unions and the Railroad, they are not included herein. It is respectfully submitted, the opinions of the Fourth Circuit Court of Appeals more adequately reply to the contentions of the petitioners than anything respondent can add: 331 Fed. 2d 530; (R. 24); (Railroad's Appendix 8a and Union's Appendix 8a). Also, in this light to be considered, is the Fourth Circuit's PER CURIAM opinion 331 Fed. 2d 540; (R. 88); (Railroad's Appendix 25a); (Union's Appendix 25a).

While economy is an important factor to the respondent, it is also the thoughtful consideration that anything added to the above Fourth Circuit's opinions would be merely cumulative except possibly the additional argument in favor of amending the Complaint

to establish the right of action because of violation of respondents' Civil Rights. The Complaint is set forth in the Unions' petition in Unions' Appendix E, 48a, and the facts are stated in 331 Fed. 2d 532 in the opinion of the Fourth Circuit and as corrected in the per curiam opinion 331 F. 2d 540.

REASONS ASSIGNED FOR DENYING WRIT OF CERTIORARI

1.

The Fourth Circuit correctly determined the subject-matter jurisdiction exists in the District Court.

Petitioners, Union and Railroad strongly contend in their briefs that either the Railroad Adjustment Board or the National Mediation Board has exclusive jurisdiction of the present controversy under the decisions of this and other Federal Courts while at the same time asserting that the writs should be granted for the reason that important questions in the administration and interpretation of the Railway Labor Act, 45 U. S. C. A. 151 et seq. are raised.

The complaint alleges that respondent was an "hourly paid employee with no authority to hire, fire or discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports * * * the defendant unions have consistently refused membership to the complainant though he has frequently requested membership and this the unions have done in an arbitrary and discriminatory fashion

with bad faith. At the same time the union did permit others to join though designated as shop foremen * * *" (Union's Appendix 49a-50a).

These allegations are nowhere denied, Union and Railroad contend that Respondents' admissions in the complaint that he was given a title of "foreman" and had been informed by an attorney for the railroad that he had no rights under the agreement as he was a supervisory employee is sufficient to oust the District Court of jurisdiction in the first instance.

It will be noted that the Fourth Circuit held only that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction *without first hearing evidence on the question of Respondent's employment status.* The Court then adds that should the District Court find that respondent was not a supervisor the action should be heard upon its merits or, to the contrary, if it should find that he was a supervisory employee then a motion to dismiss could properly be entertained. The complaint substantially charges, and asserts as fact, that respondent is an employee within the craft for which Union is the purported bargaining representative, which facts are not denied, and under the principle first enunciated in *Steele* v. Louisville & Nashville R. R., 323 U. S. 192 (1944), and followed in *Tunstall* v. *Brotherhood* of *Locomotive Fireman*, 323 U. S. 210 (1944), and subsequent cases, federal courts have subject-matter jurisdiction to enforce the duty imposed upon bargaining agents to represent all employees fairly and without discrimination.

In the *Steele* case, supra, the Court noting that Section 3, First (i) [45 U. S. C. A. § 153, First (i)] provides only for reference of disputes between an em-

ployee and a carrier and makes no reference to disputes between employees and their representatives stated: "'* * * Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board'. Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 4, p. 7."

The Fourth Circuit's action in remanding the case and requiring the District Court to ascertain the facts determinative of its own jurisdiction presents no startling innovation, *Priest* v. *Chicago R. I. & P. R. R.* 189 F. 2d 813, 8 Cir. (1951), nor, if the allegations of the complaint are substantiated as to respondent's status as an employee, is there presented any question of first impression meriting the grant of certiorari. If Respondent is not a supervisor, no interpretation of the agreement is required. However, if upon a hearing, Union and Railroad should attempt to assert that the term "supervisor", as used in the agreement, has a meaning other than accorded it in common and ordinary usage the resolution of the definition of that term would be merely incidental and thus within the holding of this Court in *Moore* v. *Illinois Central R. Co.* 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. In *Slocum* v. *Delaware L. & W. R. Co.* 339 U. S. 239, the Court in distinguishing the *Moore* case noted: "'* * * * A common-law or statutory action for wrongful discharge differs

from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provisions of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

The cases cited in the argument of Unions and Railroad in urging error on the part of the Fourth Circuit are all distinguishable from the present case upon their facts.

BRT v. *Chicago River, & I. R. Co.*, 353 U. S. 30 (1957), presented the question of a union's right to strike as an alternative to rather than pursuing its grievances with the Railroad Adjustment Board; *California* v. *Taylor*, 353 U. S. 553 (1957), involved the applicability of the Railway Labor Act to a state-owned railroad; *Pennsylvania R. R. Co.* v. *Day*, 360 U. S. 548 (1959), was an action by an employee against the carrier for extra pay alleged to be due under the terms of a collective bargaining agreement; *Hester* v. *BRT*, 8 Cir. 206 F. 2d 279 (1953), was an attempt by messenger-baggagemen, previously recognized as a distinct craft, to compel the brakemen's union to represent them without discrimination; *Roberts* v. *Lehigh & New Eng. Ry.*, 3 Cir. 323 F. 2d 219 (1963), and *Britton* v. *Atl. Coast Line R. Co.*, 5 Cir. 303 F. 2d 274 (1962), were decided on the ground that the interpretation of a collective bargaining agreement, rather than discriminatory and unfair representation was involved. It will be noted that in the *Britton* case the Fifth Circuit remanded the case for amendment of the complaint, if the plaintiffs so desired, stating: "All

parties are in agreement that if a complaint properly sets forth the theory of illegal discrimination of a type similar to *Steele* v. *Nashville R. Co.*, 323 U. S. 192, ***** jurisdiction is properly in the Courts, rather than in the Railway Adjustment Board *****"

2.

The Fourth Circuit's holding that doctrine of pendent jurisdiction is applicable to the present case is correct.

Respondent's claim for wrongful discharge against the Railroad, procured by the Union in furtherance of the Union's unfair discrimination against him is supportable by, and as a practical matter inseparable from, the facts necessary to substantiate his federal rights under the Railway Labor Act. This, without more, brings the instant case within the purview of *Hurn* v. *Ousler* 289 U. S. 238. However, Unions argue, that under *Milam* v. *Settle* 127 W. Va. 271, 32 S. E. 2d 269, and previous West Virginia cases since no recovery could be had against an unincorporated labor association as an entity that no state cause of action exists. It is believed that Union's contention is without merit.

The second syllabus of the *Milam* case is as follows:

"The liability for a tort being joint and several, the members of an unincorporated society or association, or any number thereof, may be sued as individuals, and judgment rendered against such of them as are served with process for their participation in any activity of any such society or association which operates to wrong another in his person or property."

West Virginia thus recognizes that a right of action exists and under Rule 17 (b) Federal Rules of Civil Procedure, such right would be enforceable against the Union as an entity. *Local 20, Teamsters* v. *Morton*, 12 L. ed 280, cited to the contrary in Unions' brief, merely held that a federal court lacked authority to award damages for acts which were unlawful under state law though permissible under the Labor Management Relations Act, on the ground that Congress had preempted the field. Furthermore, an employee is an individual citizen and is not deprived of the right to bring an action in Federal Court and also, "an employee is more than a ward of the Union and the employer," *Smith* v. *Evening News Association* 371, U. S. 195. See also, *Steele* v. *L. & N. R. R.*, 323 U. S. 192, 205, (1944). The "public policy" of West Virginia of "1872", served a purpose in its day but to this Respondent answers in the language of the opinion of the Fourth Circuit, "Since neither the Railroad Adjustment Board nor the National Mediation Board is the proper forum for this case, we hold that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction without first hearing evidence on the question of Rumbaugh's employment status. Should the District Court find, after examining the facts, that Rumbaugh was not a supervisor, then the action for invidious discrimination should be heard on the merits." 4 Cir. 331 F. 2d p. 538; (Union's Appendix 20a); (Railroad's Appendix 20a). The Union's argument concerning "public policy" of "1872" is superseded by the decisions of this Court. The failure of providing relief in the West Virginia Court is also another reason for being in the Federal Court since Respondent had no forum, "judicial or administrative competent to grant relief." The shades of "public policy" of "1872" is an-

other of the impossibilities that confronted Respondent. In this case—to sue the individual members of the Union is a virtual impossibility and it would also be like "suing a beggar and getting a louse" and the Respondent, like the Fourth Circuit, in the Per Curiam opinion which says of the Union's contention, "If it has merit" —Respondent believes the contention has no merit.

3.

The Fourth Circuit's holding is sustainable, and the District Court has jurisdiction under the Civil Rights Act. Rev. Stat. 1980 (3), 42 U. S. C. A. § 1985 (3).

When the allegations of the complaint are distilled, we have a picture of a "sweetheart" contract. Union and management declared a working truce to favor each other at the cost of the plaintiff and other minority members who are denied their rights, Yes! and denied even their right to inquire as to their rights. (The Complaint Union's Appendix E. 50a-51a.) See also Fourth Circuit's statement of the complaint 331 F. 2d 532, (R. 24) corrected 311 F. 2d 540, (R. 88).

Though the original complaint in the instant case did not assert the Civil Rights Act as a basis for Federal Court jurisdiction it is submitted that since a cause of action exists thereunder and may be asserted in an amended complaint, the Fourth Circuit's opinion is sustainable on that ground and provides a right of action for damages.

Rev. Stat. § 1980 (3), 42 U. S. C. A. § 1985 (3) provides in pertinent part:

> "If two or more persons in any State or Territory conspire * * * for the purpose of depriving,

> either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In Walker v. *Bank of America Nat'l Trust & Sav. Assn.* 268 F. 2d 16, the Ninth Circuit said: "In order to state a cause of action under section 1983, it is necessary to allege facts showing that the purpose of the defendants in committing the acts complained of was to discriminate between persons or classes of persons."

The Court, in the *Walker* case found that the pleadings therein contained only general allegations of such a purpose, unsupported by any factual allegations. In the instant case, respondents' complaint, taken as a whole, reflects an invidious discrimination by both union and employer, and conspiracy to injure him in his property and to deprive him of his equal protection of the laws and of his equal privileges and immunities under the laws. It is submitted that the complaint states facts that circumstances of the case are such that the complaint can, under Rules of Civil Procedure Rule 15, 28 U. S. C. A., be amended to state a claim under the provisions of 42 U. S. C. A. § 1985 (3). See also, *Lee* v. *Hodges*, 4 Cir. 321 F. 2d 480.

Furthermore, Respondent alleges that he was the owner of seniority and pension rights acquired over a period of 30 years of steady employment. The unlawful action of the defendants described in the complaint had the intended effect of depriving the complainant of these valuable property rights contrary to the Fourteenth and Fifth Amendments to the Constitution of the United States.

CONCLUSION

It is respectfully submitted that there is no error in the Fourth Circuit's ruling that the case be remanded for its preliminary hearing on the question of whether the Respondent can substantiate his allegations of subject-matter jurisdiction.

The Respondent is satisfied and in agreement with the Fourth Circuit's opinion, should this Court uphold that opinion and remand this case, it is submitted that there are questions which may ultimately again invoke this Court's consideration of the Respondent's complaint by way of the defenses thereto and the rights asserted therein. If Respondent has no right to be in this Court then the case is terminated but if the Court finds Respondent does have the right to continue litigation in the Federal Court, then it is respectfully requested, if this Court remands the case to the District Court in accordance with the Fourth Circuit's opinion, that the United States Supreme Court if it be proper at this time also consider sua sponte any of the unresolved questions which may ultimately be subject to this Court's future consideration as the Respondent being a working man and of extremely limited means,

can ill afford the expense, such litigation will impose upon him.

Respectfully submitted,

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November 10, 1964